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**IN MEMORY OF**


**JUDGE DOUGLASS BOARDMAN**

FIRST DEAN OF THE SCHOOL

**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**



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A TREATISE  
ON  
CRIMES AND MISDEMEANORS.

BY  
SIR WM. OLDNALL RUSSELL, KNT.  
LATE CHIEF JUSTICE OF BENGAL.

IN THREE VOLUMES.  
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*Fifty Edition.*

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SAMUEL PRENTICE, ESQ.,  
ONE OF HER MAJESTY'S COUNSEL.

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# A TREATISE ON CRIMES AND MISDEMEANORS.

## BOOK THE FIFTH.

OF OFFENCES WHICH MAY AFFECT THE PERSONS OF  
INDIVIDUALS OR PROPERTY.

### CHAPTER THE FIRST.

OF PERJURY AND SUBORNATION OF PERJURY.

PERJURY, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. (a)

Perjury by the common law.

Subornation of perjury by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear that if the person, incited to take such an oath, do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury, yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment. (b)

Subornation of perjury by the common law.

An indictment charged that the defendant, an attorney, being retained to defend Wood against a charge of picking Lewis's pocket, deceitfully procured himself to be employed by Lewis, and persuaded Lewis to swear before the grand jury that he did not know who picked his pocket, which he did, and no bill was returned. An objection was made that Lewis's evidence was not stated to have been false; but, upon a case reserved, the judges thought it unnecessary, as the defendant's crime was the same, unless he knew it to be true, and *that* he should have proved. (c)

The false oath must be wilful, and taken with some degree of deliberation; thus if it appears that it was occasioned by surprise,

The false oath must be wilful

(a) 1 Hawk. P. C. c. 69, s. 1. 3 Inst. 164. Com. Dig. tit. *Justice of Peace*, B. 102. Bac. Ab. tit. *Perjury*.

(b) 1 Hawk. P. C. c. 69, s. 10. Bac. Ab. tit. *Perjury*, and the authorities

there cited.

(c) Rex v. Edwards, East. T. 1764, MS. Bayley, J. And as to dissuading witnesses from giving evidence, see vol. 1, p. 360.

and taken with some degree of deliberation.

A man may be indicted for perjury in swearing that he *believes* a fact to be true.

So also if he falsely swears that he *thinks* a fact to be true.

The oath must be false.

The oath must be taken in a judicial proceeding.

or inadvertency, or a mistake of the true state of the question, it cannot be considered to amount to voluntary and corrupt perjury. (*d*)

It has been said that no oath will amount to perjury unless it be sworn absolutely and directly, and, therefore, that he who swears a thing according as he *thinks, remembers, or believes*, cannot, in respect of such an oath, be found guilty of perjury. (*e*) But De Grey, C. J., appears to have laid down a different doctrine. (*f*) And Lord Mansfield, C. J., is stated to have said, 'It is certainly true that a man may be indicted for perjury in swearing that he *believes* a fact to be true which he must know to be false.' (*g*) It is further said that, upon this question being agitated in the Court of Common Pleas, all the judges were unanimous that *belief* was to be considered as an absolute term, and that an indictment might be supported upon such a statement. (*h*)

An indictment for perjury alleged that the defendant swore that he *thought* that certain words written in red ink were not his writing; whereas the defendant, when he so deposed, *thought* that the said words were his writing; and the Court of Queen's Bench held that the assignment was sufficient. If a witness swore that he thought a certain fact took place, it might be difficult indeed to show that he committed wilful perjury. But it was certainly possible, and the averment was as properly a subject of perjury as any other. (*i*)

The important requisites in a case of perjury appear to be these: *the false oath must be taken in a judicial proceeding, before a competent jurisdiction, and it must be material to the question depending.* (*j*)

With respect to the falsity of the oath it should be observed, that it has been considered not to be material whether the fact, which is sworn, be in itself true or false; for, howsoever the thing sworn may happen to prove agreeable to the truth, yet, if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition which any stranger might make as well as he. (*k*)

The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein the King's honour or interest are concerned; as, before commissioners appointed by the King to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the King's patents. But it is not material whether the Court, in which a false oath is taken, be a court of record or not, or whether it be a court of

(*d*) See 1 Hawk. P. C. c. 69, s. 2.

(*e*) 3 Inst. 166.

(*f*) Miller's case, 3 Wils. 427. 2 Black Rep. 881.

(*g*) Pedley's case, 1 Leach, 325.

(*h*) Anon. C. P. Mich. T. 1780. 1 Hawk. P. C. c. 69, s. 7, note (*a*), p. 88 (ed. 1795). See Rex v. Crespigny, 1 Esp. 280. Lord Kenyon, C. J.

(*i*) Reg. v. Schlesinger, 10 Q. B. 670.

(*j*) By Lord Mansfield, C. J., in Rex

v. Aylett, 1 T. R. 69.

(*k*) 1 Hawk. P. C. c. 69, s. 6. Rex v. Edwards, cor. Adams, B., Shrewsbury Lent Ass. 1764; and subsequently considered of by the judges, MS. And see per Lawrence, J., in Rex v. Mawbey, 6 T. R. 619. 2 Rolle Abr. Indictment (E), pl. 5, p. 77. Allen v. Westley, Hetley, 97. Gurney's case, 3 Inst. 166. See Reg. v. Newton, 1 C. & K. 469, for a count framed to meet such a case.

common law, or a court of equity, or civil law, &c., or whether the oath be taken in the face of the Court, or out of it before persons authorized to examine a matter depending in it, as, before the sheriff on a writ of inquiry, &c., or whether it be taken in relation to the merits of a cause, or in a collateral matter, as, where one who offers himself to be bail for another, swears that his substance is greater than it is. (*l*) But neither a false oath in a mere private matter, as in making a bargain, &c., nor the breach of a promissory oath, whether public or private, is punishable as perjury. (*m*)

Much doubt formerly prevailed in certain cases as to the power to administer an oath; but this doubt is, to a great extent, removed by the Act to Amend the Law of Evidence, 14 & 15 Vict. c. 99, s. 16, by which 'every court, judge, justice, officer, commissioner, arbitrator, (*n*) or other person now or hereafter having by law or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.'

Any court, &c., may administer an oath.

It was at one time doubted whether a false oath taken in Doctors' Commons, for the purpose of obtaining a *marriage license*, amounts to perjury. But it has been since decided that a false oath before a surrogate, taken in order to procure a marriage license, will not support a prosecution for perjury; and, further, that if the indictment only charges the taking the false oath without stating that it was for the purpose of procuring a license, or that a license was procured thereby, the party cannot be punished thereupon as for a misdemeanor. The indictment stated that the prisoner, being minded to procure a marriage between himself and A. B., went before a surrogate, and was sworn to an affidavit in writing, that the said A. B. had been residing four weeks in the parish of S., whereas she had not, and so he had committed perjury; and the indictment had all apt allegations of an indictment for perjury. But a case being reserved upon the question whether on such an affidavit the party could be prosecuted for perjury, and if not, whether upon this indictment any offence was charged, the judges were unanimous that upon an oath before a surrogate, perjury could not be assigned; and that as this indictment did not charge that the defendant took the oath to procure a license, or that he did procure one, no punishment could be inflicted, and he was therefore pardoned. (*o*)

Oath to procure a marriage license.

The third count of an indictment stated that W. James was a surrogate having authority to grant licenses for marriages, and that the defendant applied to the said W. James to grant a license for the solemnization of a marriage between J. Baker and S. Fry, and that the defendant, unlawfully intending to obtain such license for the said marriage in fraud of the 4 Geo. 4, c. 76,

If a person make a false statement on oath before a surrogate for the purpose of improperly obtaining a

(*l*) 1 Hawk. P. C. c. 69, s. 3. Bac. Abr. tit. *Perjury* (A). See *R. v. Crossley*, 7 T. R. 315.

(*m*) *Id.* Ibid.

(*n*) *R. v. Hallett*, 2 Den. C. C. 237, a case before this Act.

(*o*) *Rex v. Forster*, MS. Baggall, and *R. & R.* 459. See *Alexander's case*, 1 Leach, 63. The point was submitted

to the judges, and several times agitated; but the result was not communicated, as the prisoner died in Newgate. Woodman's case, 1 Leach, 64, note (*a*). The point appears to have been submitted also in this case to the consideration of the twelve judges; but their opinion was not publicly communicated. See 3 Chit. Crim. L. 713.

marriage license, he is guilty of a common law misdemeanor.

for the purpose of obtaining such license, before the said W. James took his corporal oath upon the Holy Gospel of God, and that the defendant being so sworn as aforesaid before the said W. James as such surrogate (he the said W. James having competent authority, as such surrogate, to administer the said oath) did, for the purpose of thereby obtaining such license for the marriage of the said J. Baker and S. Fry, falsely, corruptly, &c., swear, &c., that the name of him, the defendant, was J. Baker, and that he was one of the parties for whose marriage a license was then applied for, and that he was a yeoman and widower, and that the said S. Fry had had her usual place of abode within the parish of W. in the county of S. for the space of fifteen days then last past. The count then negatived the matter sworn in the usual manner. By means of which false oath the defendant did then obtain from the said W. James, so being such surrogate, a license for the solemnization of a marriage between the said J. Baker and S. Fry. The prisoner having been convicted, upon a case reserved, it was contended that this count charged no offence. That a surrogate had no authority to administer an oath, and at all events not this oath, to the defendant. That the count did not aver that a written license was obtained, or the marriage celebrated by means of such license. But it was held that the count charged a misdemeanor. It distinctly averred that the prisoner swore falsely as to S. Fry; and any one material fact falsely sworn to is sufficient to support the charge. Then the only question was as to the surrogate's power to administer the oath; not such an oath as will support an indictment for perjury, but as will make a party guilty of a misdemeanor. By the canon law the surrogate had such power, and the 4 Geo. 4, c. 76, seems to assume that power. To make a false oath in order to procure a marriage license from an officer empowered to grant such license is a misdemeanor; because it is a step towards the accomplishment of a misdemeanor. The actual celebration of the marriage is immaterial. Anything essentially connected with marriage is a matter of public concern, and therefore may involve criminal consequences. (p)

Father of an illegitimate child.

In one case the question whether a father of an illegitimate child was included in the 4 Geo. 4, c. 76, s. 16, was raised on an indictment against the prisoner for falsely swearing before a surrogate that the father had given his consent to the marriage of his daughter, but not decided. (q)

(p) *Reg. v. Chapman*, 1 Den. C. C. 432, 18 L. J. M. C. 152. 2 C. & K. 846. Anonymous cited by the C. J. of the K. B. 1 Ventr. 370. The prisoner was indicted for wilful and corrupt perjury in making a false affidavit before a commissioner for taking oaths in the Court of Queen's Bench, for the purpose of getting a bill of sale filed under the Bills of Sale Act, 1854. Held, a misdemeanor, though not wilful and corrupt perjury. Held also, that the conclusion of an indictment for perjury, "that so the defendant did commit wilful and corrupt perjury" might be rejected as surplusage, and a conviction for the misdemeanor was right upon such an in-

dictment. *R. v. Hodgkiss*, 39 L. J. M. C. 14, 1 L. R. C. C. R. 212.

(q) *Reg. v. Fairlie*, 9 Cox, C. C. 209. The defendant was acquitted on the ground of a variance. The indictment alleged that the prisoner, intending to procure a marriage to be solemnized between himself and E. A. E., she being under the age of twenty-one years, without the consent of the natural and lawful father of the said E. A. E., to wit, without the consent of G. E., he being the person whose consent was by law required before the license was granted, falsely swore that G. E., the natural and lawful father of the said minor, was consenting. The affidavit sworn by the prisoner contained the

Before the C. L. P. Act, 1852, if an action had abated by the death of a co-plaintiff, and no suggestion had been entered according to the 8 & 9 Will. 3, c. 11, s. 6, a trial was *extra-judicial*, and no perjury could be assigned upon any false evidence given at such trial. (r)

Death of a co-plaintiff.

The oath must be taken before a competent jurisdiction, that is, before some person or persons lawfully authorized to administer it. So that a false oath taken in a court of requests, in a matter concerning lands, has been holden not to be indictable, that court having no jurisdiction in such cases. (s) And it seems clear, that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for their so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarrantable and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle. (t) But a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the King, is perjury, if taken before such time as the commissioners had notice of the demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void. (u)

Oath must be taken before a competent jurisdiction.

By 27 & 28 Vict. c. 19, entitled 'An Act to make provision for the discipline of the Navy,' s. 63, every person who, upon any examination upon oath or upon affirmation before any court-martial held in pursuance of this Act, shall wilfully and corruptly give false evidence, shall be deemed guilty of wilful and corrupt perjury, and every such offence, wheresoever committed, shall be triable and punishable in England; and where any such offence committed out of England is tried in England, all statutes and laws, applicable to cases of perjury, shall apply to the case.

Court-martial under Act for discipline of the Navy.

Wilful and corrupt false swearing before a local marine board, duly and lawfully appointed and constituted, under 17 & 18 Vict. c. 104, upon a matter material to an inquiry then being lawfully investigated by them, under 25 & 26 Vict. c. 63, s. 23, is perjury. (v)

By 38 & 39 Vict. c. 35 (The Public Health Act, 1875), s. 263, any person who on any examination on oath, under any of the provisions of this Act, wilfully and corruptly gives false evidence, shall be liable to the penalties inflicted on persons guilty of wilful and corrupt perjury.

Public Health Act.

By 32 & 33 Vict. c. 62 (The Debtors' Act, 1869), s. 14, if any

Debtors' Act, 1869.

statement set out in the indictment; but it appeared that the girl was the illegitimate daughter of G. E., who had not given his consent to her marriage. The Recorder held that, as the indictment had described G. E. as the natural and lawful father, and the evidence showed that E. A. E. had no natural and lawful father, the prisoner must be acquitted.

(t) 1 Hawk. P. C. c. 69, s. 4, and the authorities there cited; 4 Black. Com. 137. See the 5 & 6 Will. 4, c. 62, s. 13, *post*, p. 30.

(u) 1 Hawk. P. C. c. 69, s. 4. Bac. Ab. tit. *Perjury* (A).

(v) *R. v. Tomlinson*, 36 L. J. M. C. 41; 1 L. R. C. C. C. 49. It seems that the taking of a false oath before a court-martial is perjury at common law, *R. v. Heane*, 4 B. & S. 947; 33 L. J. M. C. 115.

(r) *Rex v. Cohen*, 1 Stark. B. 511. See now the 15 & 16 Vict. c. 76, s. 135.

(s) *Buxton v. Gouch*, 3 Salk. 269.

creditor in any bankruptcy or liquidation by arrangement or composition with creditors in pursuance of the Bankruptcy Act, 1869, wilfully and with intent to defraud makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding one year, with or without hard labour. See vol. 2, p. 443.

Perjury may be committed on a commission to examine witnesses issued before issue is joined.

Where after a writ had issued, but before the appearance of the defendant, a commission was issued to examine a witness on behalf of the plaintiff, and a rule had been obtained to rescind the order for the commission, it was urged in support of the rule that for a commission to go the proceedings should be in such a state that perjury could be assigned on the depositions; and that could not be without an issue joined, to which the matter sworn would be material. Lord Campbell, C. J., 'I do not agree that there could be no indictment for perjury where the examination of the witness has taken place before issue joined, if his evidence be material to the issue afterwards joined. (w)

A master extraordinary in chancery had no authority to administer an oath in matters in the court of admiralty.

A master extraordinary in chancery had no authority, by virtue of his commission, to administer an oath in matters in the court of admiralty, and therefore an indictment for perjury cannot be supported on an oath so administered. (x) But any person who made such an affidavit, with a view to its being received by the court of admiralty, knowing at the same time it was false, was guilty of a misdemeanor at common law. (y)

Jurisdiction of the insolvent debtors court after the filing of a petition.

An indictment for perjury committed before the insolvent court held under the now repealed Acts 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, alleged that notice of the insolvent's petition was inserted in the 'London Gazette,' and thereby a public sitting was appointed for the first examination of the insolvent, and that that sitting was adjourned. No evidence was given in support of these allegations, although the perjury was alleged to have been committed on the day to which the sitting was adjourned; the filing of the insolvent's petition, however, was proved; and upon a case reserved, it was held that upon the filing of the petition the Court had jurisdiction to institute the examination upon which the prisoner swore falsely; and as the Insolvent Debtors Court was a court of record, it must be presumed that its sittings in a matter within its jurisdiction were lawfully and rightfully holden; and as the indictment contained the general allegation that the Court had competent power to administer the oath to the prisoner, that was sufficient under the 14 & 15 Vict. c. 100, s. 20, and the allegations, of which no proof was given, might be rejected as surplusage. (z)

Authority to take an affidavit of debt to make a trader a bankrupt.

Where an affidavit of debt was sworn under the 1 & 2 Vict. c. 110, s. 8, with a view to make a trader a bankrupt, unless he paid or gave security, &c., perjury might be assigned upon it, notwithstanding the alterations introduced by the 5 & 6 Vict. c. 122, as to this mode of proceeding against a trader: and such an affidavit fell within the 5 & 6 Vict. c. 122, s. 67, and therefore might

(w) *Finney v. Beasley*, 20 L. J. Q. B. 396, 17 Q. B. 86.

(x) *Reg. v. Stone*, Dears. C. C. 251; 23 L. J. M. C. 14.

(y) *Per Pollock*, C. B., and *Parke*, B., *ibid.*

(z) *Reg. v. Westley*, Bell, C. C. 193, L. J. M. C. 35.



be sworn before a registrar or deputy registrar of the court of bankruptcy. (a)

Where an unmarried woman obtained judgment in a county court against the prisoner, and obtained a judgment summons against him under the City of London Small Debts Act, 15 & 16 Vict. c. 77, and on the hearing of the summons it appeared that the woman had married after she had recovered judgment in the county court, and thereupon the judge of the London court amended the summons by adding the name of the husband, and the prisoner was charged with perjury in his examination before the judge of the London court after the said amendment; it was held that the judge had no power to make the amendment, and consequently the false swearing was in a cause which had no existence and *coram non judice* (b)

A judge of the London county court has no jurisdiction where a single woman has recovered judgment, and then marries, to add the husband's name.

A person may be indicted for perjury who gives false evidence before a grand jury when examined as a witness before them upon a bill of indictment, and any person, not being a grand jurymen, who hears the evidence given before the grand jury, is competent to prove the evidence so given. (c)

Evidence before a grand jury.

Perjury was alleged to have been committed in taking a false oath on a material issue at the hearing of a county coroner's inquisition held before a deputy coroner in the absence of the coroner. The 6 & 7 Vict. c. 83, s. 1, gives a county coroner power to appoint a deputy, provided that no such deputy shall act for any coroner except during the illness of the said coroner, or during his absence from any lawful or reasonable cause. On the trial of the indictment for perjury, the prosecution gave evidence that the coroner, who was an attorney in practice, and registrar of the county court, and held other offices, was absent from his home and place of business in order to take a vacation, such absence and vacation and air and exercise having been recommended to him by his medical advisers as necessary for his health, which had become permanently impaired from an operation which he had undergone. He spent three or four days in every week, shooting. The vacation for registrars was appointed at that period of the year, and that was the only time of the year during which he obtained a vacation. The judge held at the trial, that there was lawful or reasonable cause for the absence of the coroner, and the prisoner was found guilty. Held, that the question of lawful or reasonable cause was to be decided by the judge and not by the jury, and that there was some evidence upon which the judge could so decide, and that the conviction was right. (d)

Deputy coroner.

The rule of law is that, unless a statute requires it, an information before a magistrate need not be on oath or even in writing. (e)

Unless a statute requires it, an informa-

(a) Reg. v. Dunn, 12 Q. B. 1026.

(b) Reg. v. Pearce, 3 B. & S. 531; 9 Cox, C. C. 258.

(c) Reg. v. Hughes, 1 C. & K. 519, Tindal, C. J. See *post*, as to whether a grand jurymen can give evidence of what passes in the grand jury room.

(d) Reg. v. Johnson, 42 L. J. M. C. 41.

(e) Per Parke, B. Reg. v. Millard, Dears. C. C. 166. See R. v. Shaw, 34 L. J. M. C. 169, where per M. Smith, J. 'Unless it is required by statute there

need not be an information in writing nor a summons in writing. Upon a warrant issued by a justice under 16 & 17 Vict. c. 119, s. 11, (An Act for the Suppression of Betting Houses), founded upon an information that a certain house was used as a common gaming house within the meaning of the 8 & 9 Vict. c. 109, (An Act to amend the law concerning gaming and wagers); the house was searched, and the appellant and others apprehended and brought before the

tion before justices need not be in writing or on oath.

Justices have only jurisdiction within the district where the mother resides to make a bastardy order.

If a person charged with being the father of a bastard appears before the justice, and they hear the case without any objection on his part, any defect in the summons, or in the mode of issuing it, is waived.

Where therefore an information, but not on oath, was laid before a justice against a person for wilful damage to a carriage, and the prisoner was indicted for perjury committed on the hearing of that information, it was objected that by the 7 & 8 Geo. 4. c. 30, s. 30, (*ee*) the information ought to have been on oath; but it was held that that section did not render an oath necessary in all cases, but was a cumulative provision in order to compel the appearance of the party charged, or to hear the case *ex parte* if he did not appear, and therefore the justices had jurisdiction. (*f*)

Under the 7 & 8 Vict. c. 101, s. 2, an application for an order in bastardy is to be made to the justices acting for the petty sessional division in which the mother 'may reside;' and they have no jurisdiction to entertain such an application, unless she does reside within their division, and consequently, if she do not so reside, perjury cannot be committed on such an application. (*g*)

Upon an indictment for perjury alleged to have been committed by the prisoner upon the hearing of an application by Martha Humphreys for an order upon him for the maintenance of her bastard child, it appeared that the summons was issued by a magistrate on the personal application of M. Humphreys, who stated, but not on oath, that she had been delivered of a bastard child more than twelve months previous, and that money had been paid by the prisoner for its maintenance within twelve months of its birth. The summons alleged that the prisoner had 'paid money for its maintenance within twelve months after its birth,' instead of stating that proof thereof had been made. The prisoner appeared personally in answer thereto. He was also assisted by an attorney. No objection was made to any of the proceedings on which the summons was founded, and the case was gone into on the merits before the stipendiary magistrate, who examined M. Humphreys in support of the application, who proved the payment of money as alleged, and the prisoner in answer thereto, who swore he had never paid her any money. It was objected that, as there had been no proof on oath of money having been paid for the maintenance of the child within twelve months from its birth before the summons was issued, the magistrate had no jurisdiction to hear the

petty sessions, when the appellant was charged with having the management of a room in the said house for the purpose of betting with persons resorting thereto, upon horse races, contrary to the statute. No information charging such offence, or summons embodying such information had been issued or served. Held, by the majority of the Court (Cleasby, B., and Grove, J.), Field J., dissenting, that the want of such information or summons rendered the proceedings on the hearing invalid, and that the conviction thereon must be quashed. Held, further, that a month's notice of the taking of such proceedings was not necessary before laying an information under 16 & 17 Vict. c. 119, s. 17. *Blake v. Beech*, 45 L. J. M. C. 111.

(*ee*) The 24 & 25 Vict. c. 97, s. 62, re-enacts sec. 30 of the former Act. See the clause in the Appendix.

(*f*) Reg. v. Millard, Dears. C. C. 166.

(*g*) Reg. v. Hughes, D. & B. C. C. 188. In this case the mother was delivered in March, and resided with her parents till November. She then went and lodged at D. in another petty sessional division for three weeks, and then applied to the justices of that division. Her lodging there was not for any improper or fraudulent purpose, but because the justices met in the town, and it was more convenient for her than to go a distance from her parents' house to the justices' meeting of the division in which her parents resided. After the order she went into service without returning home. The jury found that she had no other home than D., and that she was residing at D., if in point of law she could under the circumstances be considered to be so. It was held that the justices had jurisdiction to make the order, as her residence was at D.

case; but, upon a case reserved, it was held that the prisoner had waived the objection. The proceeding against the putative father is not a proceeding *in pœnam* to punish for a crime, but merely to impose a pecuniary obligation, and the summons is mere process to bring the defendant into court in a civil suit. According to strict regularity, before the summons issued there ought to have been evidence on oath of the payment of the money, although it is not expressly required by the statute to be on oath, as in the case where the complaint is made before the birth of the child. Further, it would have been proper that the summons should have been in the form given by the statute; but supposing that, if the prisoner had not appeared, the petty sessions could not have lawfully proceeded to hear evidence of the paternity; or that, if he had appeared, and objected to the regularity of the summons, the objection ought to have prevailed; yet when he actually appeared, and, instead of objecting to the regularity of the summons, asked the Court to give judgment in his favour on the merits, and tendered evidence to absolve himself from liability, he waived any irregularity there might be in the process, and when he had thus submitted himself to the jurisdiction of the Court, the Court had jurisdiction to hear and decide the case. (*h*)

Upon an indictment for perjury, it appeared that the perjury had been committed upon the hearing of a second application for a bastardy order, a former application having been heard by the magistrates and dismissed upon the merits. It was contended that the magistrates were *functi officio* after the first application had been dismissed on the merits, and had no jurisdiction to entertain the second application. But, upon a case reserved after conviction, the judges were unanimously of opinion that the magistrates had jurisdiction to hear the second application and administer an oath. The Court of Queen's Bench had decided that one inquiry on the merits did not make the matter a *res judicata*; but even if the previous dismissal were a defence, still the magistrates on the second application had jurisdiction to hear the application and administer an oath. (*i*)

An indictment alleged that T. Horne was duly licensed to keep a beer-house, and that an information had been laid against him for that he, being duly licensed to keep a beer-house, had it open unlawfully on the morning of Sunday, the 6th of February, 1853, and charged the defendant with falsely swearing that he had not been supplied with beer in the house on that morning. Horne's license was for a year, commencing on the 11th of May, 1853, but Horne was keeping the beer-house on the 6th of February previously. It was objected that the averment that Horne was duly licensed on the 6th of February was not proved, and that if he was not so licensed, the justices had no jurisdiction to hear the information. But Crompton, J., held that the justices had jurisdiction generally over the subject of keeping houses for the sale of beer

Justices have jurisdiction to hear a second application in a case of bastardy.

Justices have a general jurisdiction over public-houses.

(*h*) Reg. v. Berry, Bell, C. C. 46, Martin, B., *dissentiente*. The application for the bastardy order was made under the 7 & 8 Vict. c. 101, and the 8 & 9 Vict. c. 110; R. v. Fletcher, L. R. 1 C. C. R. 320; 40 L. J. M. C. 125; See R. v. Simmonds, Bell, C. C. 168; 28

L. J. M. C. 183; Reg. v. Wiltshire, 12 Ad. & E. 793; R. v. Smith, 11 Cox, C. C. 10; R. v. Chugg, 11 Cox, C. C. 558.

(*i*) Reg. v. Cooke, 2 Den. C. C. R. 462; 21 L. J. M. C. 136. See Reg. v. Brisby, 1 Den. C. C. 419; Vol. 1, p. 562.

and other liquors open on Sunday ; and that as, in order to establish an offence, it was not necessary to prove that the keeper of the house was licensed, what was sworn on the subject of Horne's keeping the house open brought the case within the jurisdiction of the justices, even if it turned out that he was not licensed at the time. (*j*)

Master and  
Apprentices  
Act.

By 4 Geo. 4, c. 34, s. 2, all complaints which shall arise between masters or mistresses and their apprentices, as to wages, &c., may be heard and determined before a justice of the peace. After an apprenticeship was over, the former apprentice summoned his late master under this Act for wages alleged to be unpaid, and on the hearing swore falsely. It was held, that this was perjury, inasmuch as the magistrate had, at all events, jurisdiction to determine whether the relation of apprenticeship continued or not. (*k*)

Information  
under the  
Game Act  
not properly  
verified.

The 6 & 7 Will. 4, c. 65, s. 9, renders it necessary that an information under the 1 Will. 4, c. 32, the Game Act, should be verified on the oath of a credible witness before any proceeding is taken upon it for summoning the party accused or compelling his appearance, and if this course has not been adopted, the justices have no jurisdiction to hear the case ; and, consequently, a person giving false evidence on such an occasion is not guilty of perjury. (*l*)

The oath must  
be material to  
the question  
depending.

The oath must be material to the question depending : for if it be wholly foreign from the purpose, or altogether immaterial, and neither in any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant ; as, where a witness introduces his evidence, with an impertinent preamble of a story concerning previous facts, not at all relating to what is material, and is guilty of a falsity as to such facts. (*m*)

If it appear plainly that the scope of the question to a witness was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he gave a particular and distinct account of the circumstances which afterwards appears to be false ; it seems he is guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. (*n*) And it is spoken of as a reasonable opinion, that a witness may be guilty of perjury in respect of a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the

If it is cir-  
cumstantially  
material, it is  
sufficient.

(*j*) *Reg. v. Kirton*, 6 Cox, C. C. 393. Crompton, J., refused to reserve the point.

(*k*) *R. v. Sanders*, 1 L. R. C. C. R. 75. See *R. v. Bacon*, 11 Cox, C. C. 540, a case where it was held that the magistrate had no jurisdiction, and consequently that the prisoner had not committed the offence of perjury.

(*l*) *Reg. v. Scotton*, 5 Q. B. 493. See *R. v. Western*, 10 Cox, C. C. 93.

(*m*) *Rex v. Griepre*, 1 Lord Raym. 256. *Bac. Ab. tit. Perjury (A)*. See 2 Roll. 41, 42, 369. *Held*, 97, 1 Hawk. P. C.

c. 69, s. 8.

(*n*) See 1 Hawk. P. C. c. 69, s. 8. Upon an indictment for robbery committed on the 13th of April, between eight and ten o'clock at night, a witness for the prisoner swore, not only that the prisoner was at home at that time, but in answer to the judge said, that the prisoner had lived in the same house for the two years previous, and that during the whole of that time he had not been absent from the same house for more than three nights together. The last two statements were proved to be false, as the

more material part of the evidence; as if, in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's mark, whereas, in truth, the defendant never used any such mark. (o) And it appears to have been holden not to be necessary that it should be shown to what degree the point in which a man is perjured was material to the issue, and that it will be sufficient if the point were circumstantially material. (p) And still less is it necessary that the evidence be sufficient for the plaintiff to recover upon, since evidence may be very material, and yet not full enough to prove directly the point in question. (q) Where A. advanced money to B. on two distinct mortgages, upon one of which the security was insufficient, and B. assigned the equity of redemption in both to C., who assigned the insufficient estate to an insolvent, and filed a bill against A. to redeem the other, to which bill A. put in his answer, and therein denied having had notice of the assignment to the insolvent; it was holden that the notice was a material fact upon which perjury might be assigned. (r)

An indictment for perjury committed before commissioners of taxes on an appeal of W. Hewatt against a surcharge for a greyhound used by him on the 24th of November, averred that it was a material question whether a certain receipt produced by the prisoner on the hearing of the appeal was given to him before the 12th of September then last past, and that the prisoner falsely swore that the receipt was given to him before the said 12th day of September. At the commissioners' meeting, evidence was given that Hewatt and the prisoner were coursing, on the 24th of November, with two greyhounds, one of which had been Hewatt's, who had no certificate. Hewatt, in support of his appeal against a surcharge for this dog, said that the dog had been sold to the prisoner long before, and called the prisoner as a witness. The prisoner swore that he bought the dog on the 6th of September, and produced a receipt for the purchase money bearing that date. The surveyor asked him whether the receipt was given at the time of the sale, and he said it was not, but a few days after. On being pressed, he said it was given to him before the 12th of September. The surveyor pointed out to him that the receipt bore date the 18th of November, so that the prisoner must be mistaken; but the prisoner persisted, and swore positively that it was given him before the 12th of September. Officers from the stamps proved that the paper, on which the receipt was written, was stamped on the 18th of November, and could not have been issued from the stamp office before that day. It was objected that the materiality of the question as stated in the indictment had not been shown; that the

It need not be sufficient to prove the point in question.

Whatever affects the credit of a witness on cross-examination is material. If, therefore, a witness swears on cross-examination to the date of a receipt, it is material, if his credit would be affected by the fact of that date being false.

prisoner for a whole year of the period spoken to, had been in prison. Held, that the evidence so last given was material to the inquiry, and the proper subject of assignments of perjury, inasmuch as those latter statements tended to render more probable the previous statements made, that the prisoner was at home on the night of the 13th of April. *Digitized by Google*  
Tyson, 37 L. J. M. C. 7; 11 Cox, C. C.

1. See *R. v. Naylor*, 11 Cox, C. C. 13; *R. v. Alsop*, 11 Cox, C. C. 264.

(o) *Bac. Ab. tit. Perjury* (A). 1 Hawk. P. C. c. 69, s. 8. See *Reg. v. Gardiner, post*, p. 52, *et seq.*

(p) *Rex v. Gripepe*, 1 *Ld. Raym.* 256; *R. v. Muscot*, 10 *Mod.* 195.

(q) *Reg. v. Rhodes*, 2 *Ld. Raym.* 886. *Reg. v. Peake*, N. P. R. 138, Lord Kenyon, C. J.

material question was, whether the dog was the prisoner's or Hewatt's on the 24th of November, the day of the coursing. It had not been disproved that there had been a sale of the dog on the 6th of September; and, if there was, the time of giving the receipt, or even the fact of any receipt having been given, was immaterial. The objection was overruled, and on its being repeated on a case reserved, Lord Abinger, C. B., said, 'The whole matter turned on the credit of the witness, and he tries to support his credit by false evidence. The receipt is to confirm his evidence, and he swears it was given before the 12th. If that were true, the proof would be decisive.' Williams, J., 'The time when this receipt was given is a step in the proof.' Lord Denman, C. J., 'Everything is material which affects the credit of the witness.' Lord Abinger, C. B., 'Every question, in cross-examination, which goes to the credit of the witness, is material. If a witness were asked, in cross-examination, whether he was in such a place at such a time, and he denied it, that would be material if it went to his credit. In the present case, if they could not have contradicted the prisoner by the date of the stamp, the receipt confirming his evidence would have made out the case before the commissioners. (s)

The day on which a sale took place may be material.

The prisoner was indicted for perjury before a court of requests, in a proceeding, under the interpleader clause of the Act establishing the court, to ascertain whether a certain pig, which had been seized under an execution issued against him on the 26th of September, had been sold by him on the 5th of August to his brother. The prisoner had sworn that he had sold the pig to his brother on the 5th of August, and the allegation of perjury was, that the pig was not sold by the prisoner to his brother on the said 5th day of August. It was contended that whether or not the pig was sold on the 5th of August was not the material question; the material question was whether or not, at any time before the issuing of execution, there had been a sale of the pig by the prisoner to his brother. It was quite immaterial whether the sale took place on a particular day, if it took place at some time prior to the execution. Maule, J., 'I think that the ultimate question to be decided is one thing, and yet that a material question may be raised upon a matter collateral to that question. I do not at all think that I can confine the law of perjury by making that only perjury which is material to the only question to be tried, otherwise persons might perjure themselves with impunity. It might be a material question in a case of murder what coloured coat a man had on: the colour of the pig, as I put it, might be most material; for suppose a person swore that this was a black pig, and another witness swore it was white, it would have been a material question whether the pig was black or white, although the ultimate question would have been whether it was sold at the time when it was alleged to have been sold.' (t)

Materiality of

On the hearing of an information against Robinson, under the

(s) *Reg. v. Overton*, C. & M. 655. 2 M. C. C. R. 263, A.D. 1842. See this case on another point, *post*, p. 55.

(t) *Reg. v. Altass*, 1 Cox, C. C. 17, A.D. 1843. A case once occurred at Gloucester where on an indictment for stealing a rabbit the question turned on

whether a rabbit found in the prisoner's possession was a buck or doe rabbit, and numerous witnesses were called on each side, and the verdict was, 'We find it was a buck rabbit'—a case well illustrating Mr. J. Maule's remarks.

1 Will. 4, c. 32, s. 30, for committing a trespass in pursuit of game on a close in the occupation of T. Warren, a witness having proved that he saw Robinson in Warren's field, and saw him commit the offence there, the prisoner swore, on behalf of Robinson, that he went with Robinson into a lane adjoining the field, and that Robinson shot into the field, but did not enter it, and that he himself went into the field, and fetched off what Robinson killed. It was contended that this evidence was not material; because Robinson was equally guilty of an offence within the 1 Will. 4, c. 32, s. 30, whether he went into the field and shot there, or whether he shot from the lane, and the prisoner in his company went in and brought away the game. But Williams, J., held that the evidence was material. (*u*)

evidence as to entering a close in pursuit of game.

An indictment alleged that a cause of divorce or separation was pending in the Court of Arches, which was promoted by E. Kelly against her husband J. Kelly, and that J. Worley was examined as a witness on behalf of E. Kelly, and that interrogatories were exhibited to Worley on behalf of J. Kelly, and that Worley falsely swore that he never passed by the assumed names of Abbott or Johnson, and it was proved that Worley was a witness on the part of the wife in the suit, and that interrogatories on behalf of the husband, by way of cross-examination, were exhibited to him, and that one of the questions put to him, with the view of impeaching his credit, was 'Have you not passed by the name of Abbott and also of Johnson?' He answered, 'I never passed by the assumed name of Abbott or Johnson.' He had, however, for several years gone by the name of Abbott, and lived with a woman who took that name, and two of his children by her were christened in that name. Lord Denman, C. J., 'I do not think that the evidence of materiality is sufficient. I do not mean to say that a false answer given, under such circumstances as those proved, might not support a charge of perjury; but I am of opinion that in this case enough has not been shown on the part of the prosecution to connect the false answer with the issue on which the evidence was given. It might have been material, but we cannot clearly see that it was so.' (*v*)

Materiality of passing by a different name.

Where on a trial for rape the prosecutrix swore that she had never got one Williams to write a letter for her, which was shown to her, and on a trial for perjury in so swearing, it was proved that she had got Williams to write a letter to the person she had charged with the rape, saying, 'I will do all I can to clear you.' 'I should not have went to the police about the matter at all, if I had not been persuaded by' two persons whom she named, &c.; it was held that the evidence relating to the writing of this letter was clearly material. (*w*)

Evidence by a woman on a trial for rape as to a letter sent by her to the prisoner.

The prisoner was indicted for perjury committed by him on the hearing of a summons, which he had taken out against the prosecutor before the justices at petty sessions, for using language

Where statute merely collateral.

(*u*) Reg. v. Scotton, 5 Q. B. 493, A.D. 1844. The question was argued in the Q. B., but not decided, the case going off on another point. See *ante*, p. 10.

(*v*) Reg. v. Worley, 3 Cox, C. C. 535, A.D. 1849. As no part of the evidence, except the single question and answer, is

stated, it is impossible to see what this decision amounts to.

(*w*) Reg. v. Bennett, 2 Den. C. C. 240, A.D. 1851. Talfourd, J., on the trial, and approved by the judges on a case reserved on other points.

calculated to incite him to commit a breach of the peace. The language used by the prosecutor was in consequence of the prisoner, as the prosecutor alleged, having kicked and struck a horse, and several witnesses were called who proved this. The prisoner's attention was then called to what the witnesses had said, and he was asked on cross-examination whether it was true; he, however, denied that he had ever kicked or struck the horse, and the justices thereupon committed him for trial for perjury. Held, that no perjury could be assigned, as the statement by the prisoner that he had never kicked or struck the horse was merely collateral. (*x*)

If a witness gives false evidence as to a document in order that it may be admitted in evidence, this evidence is material, though the document be inadmissible, or not put in evidence.

Upon the trial of *Doe d. Richard v. Griffiths*, a copy of the will of William Joseph was tendered, and on objection to its admissibility, the prisoner, who was then attorney for the lessor of the plaintiff, swore that he had examined the copy produced with the original will, in the registry at Llandaff; and upon further objection that the original will was inoperative in respect of a chattel interest, and that, therefore, either the probate ought to be produced or the Act Book be proved, the prisoner further deposed that he had examined the memorandum at the foot of the copy of the will, with the entry in the Act Book at the same registry. Upon this evidence the judge offered to receive the document in evidence, but the plaintiff's counsel withdrew it. Upon the trial for perjury, it was proved that the defendant had not made either of the examinations which he had so deposed to, and he was found guilty of perjury; but Erle, J., reserved the question, whether the false oath was relevant and material to the issue then being tried, so as to amount to perjury; as to which the following were the facts:—On the trial of the ejectment, the lessor of the plaintiff claimed to be entitled to a term, which had been granted to William Joseph and Rees Morgan jointly; and his title was that Morgan had survived Joseph, and assigned the term to Catherine, the widow of Joseph, who married Saunders, and on her marriage made a settlement, under which the term vested in him. The will of Joseph was irrelevant to this title; but the time of his death was a material fact, in order to prove that Morgan survived him, and proof of the probate of the will of Joseph would thus have been relevant evidence towards establishing the plaintiff's title. The purpose of the plaintiff's counsel in tendering the evidence, was to clear a doubt respecting the interest of Joseph in the term, which was expected to be raised by the defendant, and after the document was withdrawn, the survivorship of Morgan to Joseph was clearly proved by other evidence for the plaintiff; but the purpose for which the document was offered was not stated on the trial of the ejectment. In the registry at Llandaff it was the practice to indorse the act of probate on the original will, and the book called 'The Act Book' contained a daily account of the matters of business completed in the registry, and the memorandum at the foot of the document in question was a copy of the entry in this book relating to the probate of the will of Joseph, and not a copy of the act of probate indorsed on the original will. It follows that the examination of the document tendered with the entry in the book called



'The Act Book' at Llandaff, did not render the document legally admissible as an examined copy of the act of probate. For the prisoner, it was contended before the judges, that the question was simply whether if a witness swears that he has examined a document, *not receivable in evidence*, with a certain book, that can be said to be material to the issue? The time of Joseph's death was in issue; how could the fact that the witness swore that he had examined a paper, not receivable in evidence, with a certain book, be material to the *issue* then being tried? It is not enough that the evidence has relation to the matter in issue; it must be material to the issue. It was contended, when the defendant was tried, that what he had sworn was material for the jury, who were to act on the evidence before them; and, secondly, that it was material for the judge, who was to say whether it was to be put to the jury or not. But it could not be material for the jury; for it was withdrawn from their consideration, and they could not legitimately act upon it; and here the judge was not a judge of fact. This evidence was not on any issue of fact which the judge had to try. It was merely evidence to be given to the jury through the judge. Lord Campbell, C. J., 'I am of opinion that the conviction was right. There was false swearing in a judicial proceeding. How can it be said not to have been material? It was necessary to prove that Joseph died before Morgan. Although the fact of Joseph's death had been proved by parol testimony, if evidence was given to show that probate had been granted of Joseph's will while Morgan was still living, it would have been material in corroboration. With a view to have the copy of the will received in evidence, the defendant swore falsely that he had examined the paper produced with the original will at Llandaff, and the entry on it with the entry in the Act Book; and thereupon the judge said, I will admit it, and if it had been read, it would have gone to the jury with the rest of the evidence in the case. Afterwards the document is withdrawn, but that cannot purge the false swearing committed by the defendant. It has been said that if the judge were wrong in admitting the document in evidence, the defendant could not be convicted, making the offence of perjury depend upon whether a judge were right or wrong in his decision on a question of law, and upon the decision of some nice point in a bill of exceptions, which might ultimately go to the House of Lords. We are all of opinion, as the evidence was given in a judicial proceeding, with a view to the reception in evidence of a document, which was material, and as that evidence was false, that all the ingredients necessary to constitute the crime of perjury are present.' (y)

Where a count stated that it was a material question whether a bond was obtained by the fraud of the prisoner, and that the prisoner falsely swore that he read over and explained it to the obligor; it was objected that the omission to read over the bond

Reading over  
a bond before  
execution.

(y) *Reg. v. Phillpotts*, 2 Den. C. C. 302. 3 C. & K. 185, A.D. 1851. In the course of the argument, Maule, J., said, 'Here the defendant by means of a false oath endeavours to have a document received in evidence; it is, therefore, a false oath in a judicial proceeding; it is

material to that judicial proceeding; and it is not necessary that it should have been relevant and material to the issue being tried.' In *Reg. v. Gibbon*, *infra*, Pollock, C. B., said that there was a great deal of very good sense in Lord Campbell's judgment in this case.

was no evidence of fraud, and therefore the statement was not material; but Erle, J., overruled the objection, as the reading over the bond would be strong evidence to negative fraud. (z)

Evidence of the destruction of accounts on a charge of larceny.

The prisoner was indicted for having falsely sworn before justices, on a charge against the prosecutor for stealing three books of account, that she saw him destroy another book of accounts, the prosecutor being also charged with embezzlement; and Watson, B., held that the evidence was not material. Its being calculated to influence the minds of the magistrates would not be sufficient. It would be merely bad conduct in one instance, inducing a probability of bad conduct in another. On the charge for embezzlement it would have been material evidence. (a)

Materiality of evidence on a reference of a cause and all matters in difference.

An indictment alleged that a cause came on to be tried at the Assizes, and that the cause and all matters in difference between the parties were referred to an arbitrator, and assigned perjury before him as to the signature of a paper. The arbitrator said that it was impossible for him so to distinguish between the matters in the cause and the other matters in difference between the parties, as to say definitively to which head the questions put to and the answers given by the prisoner referred, and there was no other evidence on the point. Gurney, Q. C., 'In all these cases it is necessary to show that the matter alleged to be falsely sworn was material, and that cannot be done in this case without proof that it was material either to the action or to the other matters in difference. The evidence failing to show this distinctly, the defendant must be acquitted.' (b)

Materiality of evidence before a coroner.

An indictment for perjury, committed before a coroner while holding an inquest on the body of J. Conolly, alleged that it was a material question whether the deceased, the prisoner, or another person had drank any intoxicating liquor after they had left a police barrack and before they had arrived at a guard-room, and that the prisoner falsely swore that none of them had tasted any intoxicating liquor during that interval. This statement was clearly shown to be false, but there were no grounds for supposing that the deceased came to his death from anything except from the effects of having been exposed to the night air. It was objected that the matter so falsely sworn was not material, and Monahan, C. J., was inclined so to hold; but he left the question of materiality to the jury, and they convicted; and, upon a case reserved, it was held that the evidence was material. It was the duty of the coroner to inquire into all the circumstances attending, or which might have caused, the death of the person upon whom the inquiry was held. That being so, it at once became material to ascertain whether or not death had not been caused to some extent by the deceased having been tipping in a public-house, and

(z) Reg. v. Smith, 1 F. & F. 98, A.D. 1858.

(a) Reg. v. Southwood, 1 F. & F. 356, A.D. 1858.

(b) Reg. v. Ball, 6 Cox, C. C. 360, A.D. 1854. Gurney, R., is far too good a criminal lawyer to have made such a decision as this, and I have the best authority for saying that he never did so decide. Probably the evidence failed to

show that the evidence was material in any respect upon the hearing of the matters referred. It is obvious that the paper in this case might have been material both to the matter in issue in the cause, and to the other matters referred, and yet according to this report the evidence would not have been material. C. S. G.

therefore in a state to render it more probable that he should have lost his way. It was material for the coroner to ascertain, not alone the actual cause of death, as murder, *felo de se*, or otherwise, but also all the circumstances attending it, and therefore it was a necessary part of his duty to ascertain the way in which the deceased spent the evening before his death. (c)

An indictment for perjury alleged that the prisoner falsely swore at a petty sessions that D. Rees was the father of her illegitimate child, and that her master, who was the uncle of D. Rees, had promised to raise her wages if she would swear the child to a man other than the said D. Rees, and if she would do so he would permit her to lie in at his house. Martin, B., expressed a strong opinion that this evidence as to the promises made to her by her master was not sufficiently material to the issue before the justices so as to amount to the crime of perjury; but he left the case to the jury. (d)

Evidence of mother on an application in bastardy.

The prisoner was indicted for perjury alleged to have been committed by him on the hearing of an application of M. Humphreys, the mother of a bastard child, for an order in bastardy to be made upon the prisoner. Upon the hearing M. Humphreys swore that on the day after the birth of the child the prisoner paid her 1*l.* 7*s.* 6*d.*, and that he paid her a weekly sum for several weeks after; in answer thereto the prisoner swore that he never paid M. Humphreys any money at all upon any account whatsoever, and on this statement perjury was assigned; it was objected that this assignment of perjury was upon a matter immaterial on the hearing; but, upon a case reserved, it was held that it was clearly material; for it was necessary to prove at the hearing the payment of the money; and further, the payment of the money for the maintenance of the child was corroborative evidence of the paternity. (e)

Materiality of payment of money to the mother of a bastard.

Brennan being charged before justices of the peace with a robbery in a railway carriage, cross-examined the prosecutor after he had given his evidence in support of the charge, as to whether he had been in company with himself and the prisoner at Manchester on the previous day, and then called the prisoner, who swore that the prosecutor had accosted him, whilst in company with Brennan, and proposed that he should assist him to break into his uncle's house; and it was held that this evidence was in a matter immaterial to the inquiry before the justices. (f)

Evidence which ought not to have been admitted held to be immaterial.

Justices have no right to inquire into the truth of a charge of libel preferred before them, or to hear any other justification. If publication is proved, they are bound to commit. Where, therefore, an indictment was preferred for perjury alleged to have been committed in the course of the cross-examination of a witness for the defendant on a charge of libel before magistrates, the object of which was to prove the truth of the libel, such cross-examination

(c) Reg. v. Courtney, 7 Cox, C. C. 111, A.D. 1856.

(d) Reg. v. Owen, 6 Cox, C. C. 105, A.D. 1852. The report does not show how any such evidence was admitted before the justices. Acquittal.

(e) Reg. v. Berry, Bell, C. C. 46, A.D. 1859.

(f) Reg. v. Murray, 1 F. & F. 80,

A.D. 1858. Martin, B., after consulting Byles, J. This case seems to be overruled by Reg. v. Gibbon, *infra*. On its being cited in that case, Martin, B., said, 'That case should not be looked upon as any authority. It was only my impression of what was material formed hastily

not being upon matter material to the issue, the Court directed an acquittal. (g)

If a witness is cross-examined as to a matter on which his answer ought to be held conclusive, but another witness is permitted to contradict him as to such matter, this evidence is material, and if false is the subject of perjury.

The prisoner was indicted for falsely swearing on the hearing of an application in bastardy, that he had connection with the mother of the child. The mother in support of the application had made a deposition before the magistrates, and she was then cross-examined as to whether she had not had connection with the prisoner in the September previous to the birth of the child, which was on the 29th of March, and she denied it. The prisoner was called for the alleged father, and swore that he had had connection with her as imputed by the question put to her. It was objected that the evidence given by the prisoner was not material to the issue raised on the application for the affiliation order, as the question put to the mother as to her having had connection with the prisoner merely went to affect her credit, and her answer to it ought to have been regarded as conclusive, and the evidence given by the prisoner was inadmissible. But, on a case reserved, it was held that the prisoner was liable to be convicted. 'It is now clearly established that a cross-examination going to a witness's credit is material, and that perjury may be assigned upon it.' (h) Here, therefore, the mother might have been indicted if she had sworn falsely on cross-examination upon this matter. 'Although it did not refer to the main issue, which was the paternity of the child, it had a bearing upon what was indirectly in issue; namely, how far the complainant was deserving of credit.' (i) 'Then, as the question only affected her credit, as soon as she had answered it, all should have been bound by her answer. This is an established rule of our law. Notwithstanding that, the magistrates admitted the evidence of the prisoner, which legally was inadmissible. Then, although not legally admissible, yet, being admitted, it had a reference to what was indirectly in issue—the credibility of the complainant. The evidence having been admitted, although wrongly, *Reg. v. Phillpotts* (j) is an authority directly in point that perjury may be assigned upon it. Although the evidence was open to objection, yet it does not lie in the witness's mouth to say that it was not a question on which he was bound to speak the truth. (k)

(g) *R. v. Townsend*, 10 Cox, C. C. 356; *M. Smith*, J.

(h) *Per Crompton*, J.

(i) *Per Cockburn*, C. J.

(j) *Supra*.

(k) *Reg. v. Gibbon*, L. & C. 109, by eleven judges, Crompton, J., and Martin, B., doubting. It was stated in the argument that the child was a full-grown child. The cases where it has been held on a trial for rape that the woman may be proved to have had connection with other men, were distinguished by Williams, J., on the ground that 'the character of the prosecutrix in those cases may be so mixed up with the facts as to be material, not only to her credit, but to the cause.' By the counsel for the prosecution they were distinguished on the ground that voluntary intercourse with others was very material on the question whether she consented to the act. At such a time that one of them might

tion was not denied by any judge. The cases where in an action for seduction such evidence has been held admissible, were distinguished on the ground that such evidence affected the damages. But although Alderson, B., in *Verry v. Watkins*, 7 C. & P. 308, left such evidence to the jury in mitigation of damages, he first left the question to them whether the defendant was the father of the child, and my recollection of the case (in which I was counsel for the defendant) is that the evidence was given chiefly with a view to that question. And in *Grinnell v. Wells*, Gloucester Spr. and Sum. Ass. 1843, the mother on the first trial swore to connection with the defendant on one occasion only; and on the second trial before Williams, J., evidence of an *alibi* was given, and also evidence that the mother had had connection with others

Upon an indictment for perjury in an answer to a bill filed against the defendant in chancery, stating that the defendant promised to pay Martin 1,000*l.* as a marriage portion, when he was about to marry the defendant's niece: the defendant, by his answer, insisted that as there was no promise in writing, he was entitled to the benefit of the Statute of Frauds, but as to the fact, denied that he had ever made any such promise, on which denial perjury was assigned. Lord Kenyon, C. J., said, that 'he thought this was not such a material fact as would support the indictment. This promise was absolutely void, and, supposing it in fact to have taken place and acknowledged by the defendant, could not be enforced either at law or in equity; that Court had no power to decree a performance of it. It might be a false swearing, but did not amount to what the law denominated perjury.' (l)

Perjury cannot be assigned on an answer in chancery, denying a promise absolutely void by the statute of frauds.

So where upon an indictment for perjury, alleged to have been committed in an answer to a bill filed in chancery, it appeared that the bill was filed against the defendant and Robinson, in order to compel the specific performance of a contract for the purchase of a freehold estate, and it was not stated in the bill that the contract was in writing, but it was alleged that the defendants had frequently since the contract was entered into, admitted that the plaintiffs were interested in the purchase; and the defendants in their answer pleaded that the alleged agreement, not being in writing, was within the fourth section of the Statute of Frauds, and could not be enforced, and also denied the agreement as set forth in the bill, and denied that they ever admitted that the plaintiffs were interested in the purchase as stated: and upon these denials perjury was assigned. It was admitted that the agreement was not in writing, and that there was not any memorandum or declaration of trust respecting it. It was objected that the alleged perjury was not material or relevant to the matter in issue in chancery; the agreement not being in writing, the defendant relied on the Statute of Frauds as a good ground of defence. The denial therefore of an agreement which the Court had no power to enforce was immaterial and irrelevant to the investigation of the several matters in the bill. The counsel for the prosecution cited *Bartlett v. Pickersgill*, (m) where a party was convicted of perjury for the denial of a parol agreement for the purchase of an estate, which parol agreement a court of equity had refused to enforce. Abbot, C. J., 'It does not appear from the short statement of the case which has been cited, and which is not very distinctly reported, whether the Statute of Frauds was there pleaded and relied on. But in the present case the defendants have in their answer pleaded the statute, and insisted that this agreement not being in writing, and relating to the sale of land, is within the fourth section of that statute, and cannot be enforced. As a judge of a court of common law, it is competent for me to form my opinion upon the construction of

Perjury cannot be assigned in swearing as to a parol contract for the sale of land.

have been the father of the child; and this evidence was given only with a view to the paternity of the child. The new trial had been obtained on the affidavit (amongst others) of the defendant expressly negating any connection with

the mother. C. S. G.

(l) *Rex v. Benesech, Peake, Add. C.*

93.

(m) 4 Burr. 2255. 4 East, 577, in *notis.*

this statute, although I cannot be presumed to know how a court of equity might deal with it. The statute, for the wisest reasons, declares that agreements of this description shall not be enforced unless they are reduced into writing. These defendants, therefore, having insisted upon the statute in their answer, the question is, whether under such circumstances the denial of an agreement, which by the statute is not binding upon the parties, is material; I am of opinion that it was utterly immaterial. It is necessary that the matter sworn to and said to be false should be material and relevant to the matter in issue: the matter here sworn in is in my judgment immaterial and irrelevant, and the defendant must be acquitted.' (n)

But where a bill is filed to set aside a written contract on the ground of fraud, a party may be guilty of perjury in swearing falsely as to terms of the contract not contained in writing.

But where an indictment stated that a bill was filed in chancery against the defendant, stating an agreement to purchase certain wheat, to be paid for by draft at three months, which agreement was not reduced into writing, and that afterwards a bought note was delivered to the defendant, which note did not contain fully the terms of the agreement; that the defendant brought an action and recovered a verdict; and that he was enabled to obtain such verdict by reason of his fraudulently concealing the true terms of the agreement, and the bill prayed that one of the terms of the contract might be declared to be that the purchase money should be paid by a bill of exchange, payable three months after date; and the defendant by his answer denied the parol agreement stated in the bill, and the bill was dismissed, and the denial by the defendant was the subject of the indictment for perjury. It was contended that the indictment could not be sustained. The only legitimate evidence of the contract was the bought and sold notes. The contract by parol was void by the Statute of Frauds, and a false answer to a bill for the discovery of such a contract would not subject a person to the indictment for perjury; and *Rex v. Dunston* (o) was relied upon. Coleridge, J., 'In that case the bill in chancery was to enforce the performance of a parol contract, which could not be enforced by reason of the Statute of Frauds: and the case of *Rex v. Benesich* (p) proceeded on the same ground. Though it is true that a party cannot vary the terms of a written contract, by parol evidence, he may show by such evidence that he was induced to sign the written contract inadvertently and by fraud. In this case the object of setting up the parol terms of the contract is for the purpose of avoiding the contract on the ground of fraud.' 'I think that the principle, that parol evidence is inadmissible to contradict or vary the terms of a written contract, does not apply where the object of that evidence, as in this case, is to impeach the transaction on the ground of fraud. I think that the assignment of perjury on the denial in the answer of the parol terms, which the bill prayed to have established, is material and relevant; and I think therefore that the objection cannot be sustained.' (q)

Perjury on the trial of an indictment reversed upon error.

Perjury may be committed on the trial of an indictment, which is afterwards held bad upon a writ of error. An indictment charged the defendant with having committed perjury on the trial

(n) *Rex v. Dunston*, R. & M. N. P. R.

(p) *Supra*, note (l).

109.

Digitized by Microsoft® Reg. v. Yates, C. & M. 132.

(o) *Supra*.

of a previous indictment for perjury, upon which a party had been convicted and sentenced, but the judgment reversed on a writ of error on the ground that the assignment of perjury was insufficient; (r) and it was objected that the evidence of the defendant never could have been material, as the former indictment was held bad upon a writ of error; but the objection was overruled, on the ground that, whether a witness had committed wilful and corrupt perjury or not, could not depend on the validity in point of form of the indictment as to which he gave evidence. (s)

But it must be observed that any false oath is punishable as perjury which tends to mislead a court in any of their proceedings relating to a matter judicially before them, though it in no way affect the principal judgment which is to be given in the cause; (t) as where a person who offers himself to be bail for another wilfully swears that he is a subsidy man and assessed at four pounds in the subsidy book, when he is not a subsidy man at all. (u) So also perjury may be committed in evidence given to the judge in order that he may decide whether a document is admissible. (v)

Any oath is perjury which tends to mislead a court in any judicial proceeding.

An indictment for perjury alleged that the defendant, as executrix of her husband, was plaintiff in a cause in the county court, and that she falsely swore that she had never been tried at the Central Criminal Court for any offence, and had never been in custody at the Thames police station; it was proved that she had been in custody at the station, and had been tried at the Central Criminal Court, and acquitted by the direction of the judge; the cause in the county court was an action for goods sold by the testator, and was tried by the judge without a jury; and the verdict was for the plaintiff; and the evidence in question was given by the plaintiff during her cross-examination; it was objected that the evidence given by the defendant was not material. It could not be material on the question whether the testator in his lifetime sold the goods for which the action was brought; and as the trial in the county court was before a judge, and not before a jury, it did not weigh as to the result of that trial whether she had been tried or not; and as giving a true answer that she had been acquitted by the direction of the judge would have equally cleared her character, it could not have been material that she denied having been taken into custody and tried on that charge. Lord Campbell, C. J., 'I think that there is evidence of materiality,' and (the counsel for the prisoner having addressed the jury) he left that question to the jury, and directed them to consider whether her evidence on the two points in question might not influence the

The question of materiality was left to the jury in this case.

(r) See *Reg. v. Burraston*, *post*, p. 60.

(s) *Reg. v. Meek*, 9 C. & P. 513, Williams, J. *Mullett v. Hunt*, 1 Cr. & M. 752, was cited in support of the objection. See also *Davis v. Lovell*, 4 M. & W. 678. See 1 Hawk. P. C. c. 69, s. 4. cited, *post*, p. 33. 'If judgment be arrested in a civil action for a defect in the declaration, it has never been said that that circumstance would prevent a witness, who had been guilty of false swearing at the

previous trial, from being indicted for perjury;' per Pollock, C. B., *Reg. v. Cooke*, 2 Den. C. C. 462.

(t) 1 Hawk. P. C. c. 69, s. 3. *R. v. Mullany*, 34 L. J. M. C. 111, L. & C. 593, where a defendant on a trial of a plaintiff in a county court, wilfully, corruptly, and falsely, swore his name was Edward and not Bernard.

(u) *Reg. v. Heyson*, 12 Cr. Car. 146.

(v) *Reg. v. Phillpotts*, *ante*, p. 15.

mind of the judge of the county court in believing or disbelieving the other statements she made in giving her evidence. (*w*)

But the preceding case has been questioned, and it seems that materiality is a question of law.

But where on an indictment for perjury before a coroner a question was raised as to the materiality of the matter sworn, and that question was left to the jury, who convicted; it was held, on a case reserved, that the matter was material: and all the judges except one, after fully considering the preceding case, expressed a very strong opinion that it was for the judge to determine whether the matter was material or not. (*x*)

The question of materiality was, however, left to the jury in this case.

An indictment alleged that on the hearing of an application for an order in *bastardy*, it became material to inquire whether the prisoner had ever kissed the prosecutrix or had familiarity with her; the prisoner being examined in answer to the evidence given by the prosecutrix, swore that he never had any connection or familiarity with her, and never kissed her. It was objected that the evidence was not material, as it was far too wide in the form in which it was given. *Wightman, J.*, consulted *Erle, C. J.*, and declined to stop the case, and after pointing out the necessity for two witnesses to prove the falsehood of the prisoner's evidence, told the jury: 'Then the question arises whether the parts of his evidence which are assigned as perjury were material to the investigation. It seems to me that they were so, but that is for you. Were they material and wilfully false?' (*y*)

A man may be perjured by an oath taken in his own cause.

But a false verdict does not come under the notion of perjury.

It should be observed, that a man may be as much perjured by an oath taken by him in his own cause, either in an answer in *chancery*, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c., as by an oath taken by him as a witness in the cause of another person. (*z*) But the oath must be taken by a person sworn to depose the truth; and a false verdict does not come under the notion of perjury, because the jurors do not swear to depose the truth, but only to judge truly of the depositions of others. (*a*)

It is not necessary that the false oath were credited.

A further point of general application may be mentioned, namely, that it appears not to be important whether the false oath were credited or not, or whether the party in whose prejudice it was taken were in the event any ways damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. (*b*)

(*w*) *Reg. v. Lavey*, 3 C. & K. 26, A.D. 1850. In every previous case materiality has been treated as a question of law, and it is submitted that it is clearly so; otherwise all the cases in which it has been held that an averment of materiality is unnecessary where the materiality appears on the face of the indictment, are erroneous. In *Reg. v. Gibbon, L. & C. 109*, *Channell, B.*, said he never could understand *Reg. v. Lavey*, 'unless on the ground that there was a question whether the defendant in the County Court action meant to plead or admit the claim. That point having been ascertained, the question of materiality was no longer for the jury.'

(*x*) *Reg. v. Courtney*, 7 Cox, C. C. 111. A.D. 1856. *Ball, J.*, doubted. It is to be observed that in this case, as in the

judges held the evidence to be material; they did, therefore, treat the question as a matter of law. If they had held it to be a question for the jury, the question would have been whether the evidence warranted the verdict. See this case more fully stated, *ante*, p. 17.

(*y*) *Reg. v. Goddard*, 2 F. & F. 361, A.D. 1861. No authority was referred to in this case. Acquittal.

(*z*) 1 Hawk. P. C. c. 69, s. 5. *Bac. Abr. tit. Perjury* (A).

(*a*) *Id. ibid.*

(*b*) 1 Hawk. P. C. c. 69, s. 9. *Bac. Abr. tit. Perjury* (A). In *Rex v. Nicholls*, Gloucester Sum. Ass. 1838, *cor. Patteson, J.*, the prisoner had on the trial of one Pitt for larceny sworn that he had not given the stolen property to Pitt, but was contradicted by other witnesses,



In some cases, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the offence may not amount to perjury. Thus it appears to have been holden, that any person making or knowingly using any false affidavit taken abroad (though a perjury could not be assigned on it here) in order to mislead our courts of justice, is punishable by indictment, as for misdemeanor; and Lord Ellenborough, C. J., said, 'that he had not the least doubt that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment.' (c)

False oath indictable in some cases, though not assignable as perjury.

We may now proceed to consider the 5 Eliz. c. 9, and other statutes which relate to the offence of perjury.

By the 5 Eliz. c. 9, (d) s. 3, 'all and every such person and persons which shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever now depending, or which hereafter shall depend in suit and variance, by any writ, action, bill, complaint, or information, in any wise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts before mentioned, (e) or in any of the Queen's Majesty's courts of record, or in any leet, view of frank-pledge or law-day, ancient demesne court, hundred court, court baron, or in the court or courts of the stannary in the counties of Devon and Cornwall; or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify *in perpetuam rei memoriam*; that then every such offender or offenders shall for his, her, or their said offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of forty pounds.'

Statutes relating to perjury.

5 Eliz. c. 9, s. 3. Procuring any witness to commit perjury in any matter in suit, by writ, &c., concerning any lands, goods, &c., or when sworn *in perpetuam rei memoriam* punishable by forfeiture of 40*l*.

Sec. 4. 'If it happen any such offender or offenders, so being convicted or attainted as aforesaid, not to have any goods or chattels, lands, or tenements, to the value of forty pounds, that then every such person so being convicted or attainted of any of the offences aforesaid, shall for his or their said offence suffer imprisonment by the space of one half-year, without bail or mainprize, and to stand upon the pillory (f) the space of one whole hour, in some market town, next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed.'

Such offender not having goods, &c., to the value of 40*l*., to suffer imprisonment.

Sec. 5. 'No person or persons, being so convicted or attainted, be from thenceforth received as a witness to be deposed and sworn in any court of record (within England, Wales, or the marches of

Persons convicted not to be received

and the jury disbelieved him, and acquitted Pitt, and he was convicted of perjury in so swearing, and transported for seven years. C. S. G.

(c) *Omealy v. Newell*, 8 East, 364.

(d) Made perpetual by the 29 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 28, s. 8.

(e) Viz. (as in sec. 1) 'the King's Courts of Chancery, the Star Chamber, the Whitehall, or elsewhere within any of the King's dominions of England or Wales, or the marches of the same, where any person or persons have or from thenceforth should have authority by

virtue of the King's commission, patent, or writ, to hold plea of land, or to examine, hear, or determine any title of lands, or any matter or witnesses concerning the title, right, or interest of any lands, tenements, or hereditaments.'

(f) The 1 Viet. c. 23, abolishes the punishment of pillory in all cases, but does not 'change, alter, or affect any punishment whatsoever which may now by law be inflicted in respect of any offence, except only the punishment of the pillory.

as witnesses  
until judg-  
ment reversed.

the same), until such time as the judgment given against the said person or persons shall be reversed by attain (g) or otherwise; and that, upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be first given against them, or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm.'

Persons com-  
mitting per-  
jury to forfeit  
20*l*. and to be  
imprisoned for  
six months;  
and their oath  
not to be re-  
ceived in any  
court of record  
until judgment  
reversed.

Sec. 6. 'If any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convicted or attainted by the laws of this realm, shall for his or their said offence lose and forfeit twenty pounds, and to have imprisonment by the space of six months without bail or mainprize; and the oath of such person or persons so offending from thenceforth not to be received in any court of record within this realm of England or Wales, or the marches of the same, until such time as the judgment given against the said person or persons shall be reversed by attain (g) or otherwise; and that upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be given against them or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm.'

And if such  
offenders have  
not goods to  
the value of  
20*l*., they are  
to be set in  
the pillory,  
and have their  
ears nailed;  
and to be  
disabled from  
being wit-  
nesses until  
judgment  
reversed.

Sec. 7. 'If it happen the said offender or offenders so offending not to have any goods or chattels to the value of twenty pounds, that then he or they to be set in the pillory (h) in some market-place within the shire, city, or borough, where the said offence shall be committed, by the sheriff or his ministers, if it shall fortune to be without any city or town corporate; and if it happen to be within any such city or town corporate, then by the said head officer or officers of such city or town corporate, or by his or their ministers, and there to have both his ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any of the courts of record aforesaid, until such time as the judgment shall be reversed, (g) and thereupon to recover his damages in manner and form before mentioned.'

Disposal of  
forfeitures.

The statute further enacts, that one moiety of the said forfeitures shall be to the King, and the other moiety to such person as shall be grieved, hindered, or molested by reason of any of the offences before mentioned, that will sue for the same, &c.; and that as well the judge and judges of every such of the said courts where any such suit shall be, and whereupon any such perjury shall be committed, as also the justices of assize and gaol delivery, and justices of peace at their quarter sessions, both within the liberties and without, may inquire of, hear, and determine all offences against the said Act. (j) And it is provided that the said Act

Trial of  
offences.

The Act is not

(g) Abolished by the 6 Geo. 4, c. 50, s. 60, and *Evidence*, post.

(h) See note (f), *supra*.

(j) Secs. 8, 9.

Vict. c. 38, *post*, p. 71. Sec. 10 of 5 Eliz. c. 9, is repealed by the 26 & 27

Vict. c. 125.

shall no way extend to any spiritual or ecclesiastical court, but that every such offender, as shall offend in term as aforesaid, shall be punished by such usual and ordinary laws as are used in the said courts. (*k*) And it is also provided, that the said statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof; but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in the said Act. (*l*)

An important statute relating to the punishment of perjury is the 2 Geo. 2, c. 25, s. 2, which, in order the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, enacts, 'that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the Court or judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county for a time not exceeding seven years, there to be kept to hard labour (*m*) during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, (*n*) as the Court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.'

Besides these statutes, there are a great number relating to perjury committed in particular proceedings and transactions, and by particular persons, some of which it will be proper to notice in this place. Enactments of this description are to be met with in so many and such various statutes that it is not presumed but that many of them have not come within the editor's observation.

It should first be mentioned that the false affirmation, or declaration, of any of the people called *Quakers*, made instead of an oath, will subject the party to the penalties of perjury.

The 7 & 8 Will. 3, c. 34, except ss. 4 and 5, is repealed by

(*k*) Sec. 11.

(*l*) Sec. 13.

(*m*) The 3 Geo. 4, c. 114, provides that any person convicted of perjury or subornation of perjury may be sentenced to imprisonment with hard labour for any term not exceeding the term for which the Court may imprison for such offences,

in addition to, or in lieu of, any other punishment.

(*n*) Now penal servitude for any term not exceeding seven and not less than five years if the offence was committed after 25 July, 1864, vol. 1, p. 73. See *R. v. White*, 13 J. Q. B. 105.

to extend to spiritual courts.

Nor to restrain other punishment of perjury.

2 Geo. 2, c. 25, s. 2. Perjury and subornation of perjury made further punishable by imprisonment and hard labour or by transportation for seven years.

Offenders so committed or transported, escaping or breaking prison, or returning from transportation.

Statutes relating to perjury committed in particular proceedings, &c.

False affirmations of Quakers.

30 & 31 Vict. c. 59 (the Statute Law Revision Act, 1867). The 8 Geo. 1, c. 6, relates to the declaration of fidelity and abjuration oath to be made by Quakers; and by sec. 2 of that Act persons wilfully making false declarations under that Act are liable to the same penalties, &c., as if they had been found guilty of perjury. Sec. 1 of this Act is in part repealed by 30 & 31 Vict. c. 59. The 22 Geo. 2, c. 46, s. 36, is repealed by the above Act, 30 & 31 Vict. c. 59. The 9 Geo. 4, c. 32, s. 1, is repealed by 36 & 37 Vict. c. 91, (the Statute Law Revision Act, 1873).

3 & 4 Will. 4,  
c. 49.  
Quakers and  
Moravians.

The 3 & 4 Will. 4, c. 49, s. 1, enacts that 'every person of the persuasion of the people called Quakers and every Moravian be permitted to make his or her solemn affirmation or declaration, instead of taking an oath, in all places and for all purposes whatsoever where an oath is or shall be required, either by the common law, or by any Act of Parliament already made, or hereafter to be made:' and provides that 'if any such person making such solemn affirmation (*o*) or declaration shall be lawfully convicted, wilfully, falsely, and corruptly to have affirmed or declared any matter or thing, which if the same had been (*p*) in the usual form would have amounted to wilful and corrupt perjury, he or she shall incur the same penalties and forfeitures as by the laws and statutes of this realm are enacted against persons convicted of wilful and corrupt perjury.'

Separatists.

By 3 & 4 Will. 4, c. 82 (entitled an Act to allow the people called Separatists to make a solemn affirmation and declaration instead of an oath), s. 2, it is enacted, that if any person making such (*pp*) solemn affirmation or declaration shall, in fact, not be one of the people commonly called Separatists, or shall wilfully, falsely, and corruptly affirm or declare any other matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties and forfeitures as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

1 & 2 Vict.  
c. 77. Per-  
sons who have  
been Quakers  
and Mora-  
vians.

By the 1 & 2 Vict. c. 77, 'it shall be lawful for any person who shall have been a Quaker or Moravian to make solemn affirmation and declaration in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians,' and persons guilty of making false affirmations or declarations are liable to the same punishments as persons guilty of perjury, in the same manner as in the preceding statute. (*q*)

1 & 2 Vict.  
c. 105. All  
persons bound  
by the oath  
taken.

By the 1 & 2 Vict. c. 105, 'in all cases in which an oath may lawfully be and shall have been administered to any person either as a jurymen or a witness, or a deponent in any proceeding, civil

(*o*) The form of affirmation given by this statute is, 'I, A. B., being one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be], do solemnly, sincerely, and truly declare and affirm.'

(*p*) The word 'sworn' seems omitted here.

(*pp*) See sec. 1, *post*, Evidence.

(*q*) The form of affirmation given by

this statute is, 'I, A. B., having been one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm.' This statute was passed in consequence of *Reg. v. Doran*, 2 Moo. C. C. R. 37. See *Reg. v. Mooney*, 5 Cox, C. C. 319.

or criminal, in any court of law or equity in the united kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered : provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding ; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.'

By the 17 & 18 Vict. c. 125, s. 20, 'if any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse, or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or judge or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following ; viz., "I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful ; and I do also solemnly, sincerely, and truly affirm and declare," &c., which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.'

Affirmation instead of oath in certain cases.

Sec. 21. 'If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing, which if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.'

Persons making a false affirmation to be subject to punishment as for perjury.

By the 24 & 25 Vict. c. 66, s. 1, 'if any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required or desiring to make an affidavit or deposition in the course of any criminal proceeding, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the Court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person instead of being sworn, to make his or her solemn affirmation or declaration in the words following ; viz., "I, A. B., do solemnly, sincerely, and truly affirm and declare that the taking of any oath is according to my religious belief unlawful ; and I do also solemnly, sincerely and truly affirm and declare," &c., which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.' This section was framed from the above enactment, 17 & 18 Vict. c. 125, s. 20, *supra*.

Persons refusing from conscientious motives to be sworn in criminal proceedings to be permitted to make a solemn affirmation or declaration.

Sec. 2. 'If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.'

Punishment for making false affirmation.

By 32 & 33 Vict. c. 68, s. 4, if any person called to give evidence

in any court of justice (*r*) whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge (*r*) is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration : ' I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth.' And any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury, as if he had taken an oath.

Marriage Acts.

By 19 & 20 Vict. c. 119 (entitled 'An Act to Amend the Provisions of the Marriage and Registration Acts'), s. 2, every person who shall knowingly or wilfully make and sign or subscribe any false declaration, or who shall sign any false notice, for the purpose of procuring any marriage under the provisions of any of the recited Acts (6 & 7 Will. 4, c. 85 ; 1 Vict. c. 22 ; 3 & 4 Vict. c. 72), or this Act, shall suffer the penalties of perjury.

By sec. 18, any person who shall knowingly or wilfully make any false declaration or sign any false notice required by this Act for the purpose of procuring any marriage, and every person who shall forbid the granting by any superintendent registrar of a certificate for marriage by falsely representing himself or herself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury. (*s*)

5 & 6 Will. 4, c. 62, s. 2. Lords of the Treasury empowered to substitute a declaration in lieu of an oath, &c., in certain cases.

The 5 & 6 Will. 4, c. 62, which was passed for the purpose of abolishing unnecessary oaths, by sec. 2 enacts, 'that in any case where, by any Act or Acts made or to be made relating to the revenues of customs or excise, the post-office, the office of stamps and taxes, the office of woods and forests, land revenues, works, and buildings, the war office, the army pay-office, the office of the treasurer of the navy, the accountant-general of the navy, or the ordnance, his Majesty's treasury, Chelsea hospital, Greenwich hospital, the board of trade, or any of the offices of his Majesty's principal secretaries of state, the India board, the office for auditing the public accounts, the national debt office, or any office under the control, direction, or superintendence of the lords commissioners of his Majesty's treasury, or by any official regulation in any department, any oath, solemn affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful for the lords commissioners of his Majesty's treasury, or any three of them, if they shall so think fit, by writing under their hands and seals, to substitute a declaration to the same effect as the oath, solemn affirmation, or

(*r*) The words 'court of justice' and the words 'presiding judge' in this section shall be deemed to include any person or persons having by law authority to administer an oath for the taking of evidence. 33 & 34 Vict. c. 49, s. 1. This Act was passed shortly after the present editor, held, whilst sitting as arbitrator, that an

court of justice within the meaning of this Act. See *Bradlaugh v. De Rin*, 5 W. N., 1870, p. 9, C. P.

(*s*) The 6 & 7 Will. 4, c. 85, s. 38, is repealed by 37 & 38 Vict. c. 35 (the Statute Law Revision Act, 1874). See 3 & 4 Vict. c. 72, s. 4, vol. 2, p. 811, *ante*, p. 3.

affidavit which might, but for the passing of this Act, be required to be taken or made; and the person who might under the Act or Acts imposing the same, be required to take or make such oath, solemn affirmation, or affidavit, shall, in presence of the commissioners, collector, other officer or person empowered by such Act or Acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration, and every such commissioner, collector, other officer or person is hereby empowered and required to administer the same accordingly.'

Sec. 3. 'The declaration so substituted is to be published in the *Gazette* and after twenty-one days from the date of the *Gazette* the provisions of this Act are to apply.'

Declaration to be published.

Sec. 4. 'After the expiration of the said twenty-one days it shall not be lawful for any commissioner, collector, officer, or other person to administer or cause to be administered, or receive or cause to be received, any oath, solemn affirmation, or affidavit, in the lieu of which such declaration as aforesaid shall have been directed by the lords commissioners of his Majesty's treasury to be substituted.'

No oath afterwards.

Sec. 5. 'If any person shall make and subscribe any such declaration as hereinbefore mentioned in lieu of any oath, solemn affirmation, or affidavit, by any Act or Acts relating to the revenues of customs or excise, stamps and taxes, or post-office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statements as to any material particular, the person making the same shall be deemed guilty of a misdemeanor.'

False declarations a misdemeanor.

By sec. 6, the oath of allegiance is to be required in all cases as before the Act passed.

By sec. 7, oaths in courts of justice are to be taken in the same manner as if the Act had not passed.

Sec. 8. 'It shall be lawful for the universities of Oxford and Cambridge, and for all other bodies corporate and politic, and for all bodies now by law or statute, or by any valid usage, authorized to administer or receive any oath, solemn affirmation, or affidavit, to make statutes, bye-laws, or orders authorizing and directing the substitution of a declaration in lieu of any oath, solemn affirmation, or affidavit now required to be taken or made: provided always that such statutes, bye-laws, or orders be otherwise duly made and passed according to the charter, laws, or regulations of the particular university, other body corporate and politic, or other body so authorized as aforesaid.'

Universities of Oxford and Cambridge, and other bodies, may substitute a declaration in lieu of an oath.

Sec. 9. 'In future every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall, in lieu of such oath of office, make and subscribe, in the presence of the ordinary or other person before whom he would, but for the passing of this Act, be required to take such oath, a declaration that he will faithfully and diligently perform the duties of his office, and such ordinary or other person is hereby empowered and required to administer the same accordingly: provided always, that no churchwarden or sidesman shall in future be required to take any oath of office as has heretofore been practised.'

Churchwarden's and sidesman's oath abolished, and a declaration to be made in lieu thereof.

Declaration substituted for oaths and affidavits by persons acting in turnpike trusts.

Sec. 10. 'In any case where, under any Act or Acts for making, maintaining, or regulating any highway, or any road, or any turnpike road, or for paving, lighting, watching, or improving any city, town, or place, or touching any trust relating thereto, any oath, solemn affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made by any person whomsoever, no such oath, solemn affirmation, or affidavit, shall in future be required to be or be taken or made, but the person who might under the Act or Acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit, shall in lieu thereof, in the presence of the trustee, commissioner, or other person before whom he might under such Act or Acts be required to take or make the same, make and subscribe a declaration to the same effect as such oath, solemn affirmation, or affidavit, and such trustee, commissioner, or other person, is hereby empowered and required to administer and receive the same.'

Declaration substituted for oaths and affidavits heretofore required on taking out a patent.

Sec. 11. 'Whenever any person or persons shall seek to obtain any patent under the Great Seal for any discovery or invention, such person or persons shall, in lieu of any oath, affirmation, or affidavit which heretofore has or might be required to be taken or made upon or before obtaining any such patent, make and subscribe, in the presence of the person before whom he might, but for the passing of this Act, be required to take or make such oath, affirmation, or affidavit, a declaration to the same effect as such oath, affirmation, or affidavit; and such declaration, when duly made and subscribed, shall be to all intents and purposes as valid and effectual as the oath, affirmation, or affidavit in lieu whereof it shall have been so made and subscribed.'

Declaration substituted for oaths and affidavits required by Acts as to pawnbrokers.

Sec. 12. 'Where by any Act or Acts at the time in force for regulating the business of pawnbrokers, any oath, affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made, the person who by or under such Act or Acts might be required to take or make such oath, affirmation, or affidavit, shall in lieu thereof make and subscribe a declaration to the same effect; and such declaration shall be made and subscribed at the same time, and on the same occasion, and in the presence of the same person or persons, as the oath, affirmation, or affidavit in lieu whereof it shall be made and subscribed would by the Act or Acts directing or requiring the same be directed or required to be taken or made; and all and every the enactments, provisions, and penalties contained in or imposed by any such Act or Acts, as to any oath, affirmation, or affidavit thereby directed or required to be taken or made, shall extend and apply to any declaration in lieu thereof, as well and in the same manner as if the same were herein expressly enacted with reference thereto.'

Pecalties as to such oaths, &c., to apply to declarations.

Justices not to administer oaths, &c., touching matters whereof they have no jurisdiction by statute.

Sec. 13, reciting that 'a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace, or other person by whom such oaths or affidavits have been administered or received,' and that 'doubts have arisen whether or not such proceeding is illegal, for the more effectual suppression of such practice and removing such doubts,' enacts, 'that from and after the commencement of this Act, it shall not be lawful for any



justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being (ss): provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively. (t)

Proviso.

Sec. 14. 'In any case in which it has been the usual practice of the Bank of England to receive affidavits on oath to prove the death of any proprietor of any stocks or funds transferable there, or to identify the person of any such proprietor, or to remove any other impediment to the transfer of any such stocks or funds, or relating to the loss, mutilation, or defacement of any bank-note or bank post bill, no such oath or affidavit shall in future be required to be taken or made, but in lieu thereof the person who might have been required to take or make such oath or affidavit shall make and subscribe a declaration to the same effect as such oath or affidavit.'

Declaration substituted for oaths and affidavits required by Bank of England on the transfer of stock.

By sec. 15, declarations are substituted in lieu of the oaths required by the 5 Geo. 2, c. 7, 'An Act for the more easy recovery of debts in his Majesty's plantations and colonies in America,' and the 54 Geo. 3, c. 15, 'An Act for the more easy recovery of debts in his Majesty's colony of New South Wales.'

Sec. 16. 'It shall and may be lawful to and for any attesting witness to the execution of any will, or codicil, deed, or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing, by such declaration in writing made as aforesaid, and every such justice, notary, or other officer shall be and is hereby authorized and empowered to administer or receive such declaration.'

Declaration in writing sufficient to prove execution of any will, codicil, &c.

Sec. 17. 'In all suits now depending or hereafter to be brought in any court of law or equity by or in behalf of his Majesty, his heirs and successors, in any of his said Majesty's territories, plantations, colonies, possessions, or dependencies, for or relating to any debt or account, that his Majesty, his heirs and successors, shall and may prove his and their debts and accounts, and examine his or their witness or witnesses by declaration, in like manner as any subject or subjects is or are empowered or may do by this present Act.'

Suits on behalf of his Majesty to be proved by declaration.

Sec. 18, reciting that 'it may be necessary and proper in many cases not herein specified, to require confirmation of written instru-

Voluntary declaration in the form in

(ss) See Reg. v. Nott, C. & M. 288, post, p. 106.

(t) There are some cases where a justice may administer an oath out of his

county, and the distinction seems to be between voluntary and compulsory proceedings. See *Helier v. The Hundred of Benhurst*, Cro. Car. 211.

the schedule  
may be taken.

Making false  
declaration a  
misdemeanor.

Persons mak-  
ing false  
declaration  
deemed guilty  
of a misde-  
meanor.

Construction  
of the 5 Eliz.  
c. 9.

ments or allegations, or proof of debts, or of the execution of deeds or other matters,' enacts that 'it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this Act annexed; and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor.' (u)

Sec. 21. 'In any case where a declaration is substituted for an oath under the authority of this Act, or by virtue of any power or authority hereby given, or is directed and authorized to be made and subscribed under the authority of this Act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor.' (v)

With respect to the first of the statutes above set forth, namely, the 5 Eliz. c. 9, as it is but little resorted to at the present time, on account of prosecutions upon it being more difficult than at the common law, and as it did not alter the nature of the offence, but merely enlarged the punishment, (w) a brief statement of some of the principal points decided upon its construction will probably be deemed sufficient.

In many instances an indictment will lie at common law, when it will not lie upon this statute. Thus where a witness for the King swears falsely, he cannot be indicted on the statute. (x)

It has been adjudged that a man cannot be guilty of perjury within this statute, in any case wherein he may not possibly be guilty of subornation of perjury within it; on the ground that it is reasonable to give the whole statute the same construction; and that it cannot well be intended that the makers of it meant to extend its purview farther as to perjury, which they appear to have considered as the less crime, than to subornation of perjury, which they seem to have esteemed the greater: and, therefore, since the clause concerning subornation of perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c., does not extend to perjury on an indictment or criminal information, the clause concerning perjury, though penned in more general words, has been adjudged to come under the like restriction. (y) And it

(u) See *ante*, vol. 1, p. 197, for the punishment, and see the cases on this section, *post*, p. 107. By sec. 19, the same fees are payable on declarations as on the oaths, in lieu of which they are made. By sec. 19, the declaration is to be in the form following:—'I, A. B., do solemnly and sincerely declare, that \_\_\_\_\_ and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the \_\_\_\_\_ year of the reign of his present Majesty, entitled an Act' [here insert the title of this Act].

(v) See *ante*, vol. 1, p. 197, for the pun-

ishment. The number of statutes, which contain clauses making persons giving false evidence, making false affidavits, &c., either liable to the punishment of perjury or guilty of a misdemeanor, is so large that it is conceived they would occupy more space than the infrequency of the occasions, on which it may be necessary to consult them, warrants devoting to their insertion; all of them, therefore, have not been inserted. C. S. G.

(w) *Buxton v. Gouch*, 3 Salk. 269.

(x) *Id. ibid.*

(y) *Bac. Ab. tit. Perjury* (B). 1 Hawk. P. C. c. 69, s. 19.

has also been resolved, that as the clause concerning subornation of perjury relates only to perjury by *witnesses*, that concerning perjury extends to no other perjury than that of a *witness*; and, therefore, not to perjury in an answer in chancery; or in swearing the peace against a man; or in a presentiment by a homager in a court baron, or in a wager of law, or in swearing before commissioners of the King's title to lands. (z) And by the opinions of some, a false affidavit against a man, in a court of justice, is not within the statute. (a) But it is observed that if such affidavit be by a third person, and relate to a cause depending in suit, before the Court, and either of the parties in variance be grieved, hindered, or molested, in respect of such cause, by reason of the perjury, it may be strongly argued that it is within the purview of the statute. (b) It seems to be the better opinion that a false oath before the sheriff on a writ of inquiry of damages is within the statute. (c)

It has been collected from the clause giving an action to the party grieved, that no false oath is within the statute, which does not give some person a just cause of complaint; and, therefore, that if the thing sworn be true, though it be not known by him that swears it to be so, the oath is not within the statute, because it gives no good ground of complaint to the other party, who would take advantage of another's want of sufficient evidence to make out the justice of the cause. (d) And upon the same ground no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it: therefore, in every prosecution on the statute, it is necessary to set forth the record wherein the perjury is supposed to have been committed, and to prove at the trial that there is such a record, either by actually producing it, or by an attested copy; and it is necessary not only to set forth in the pleadings the point wherein the false oath was taken, but to show also how it conduced to the proof or disproof of the matter in question. (e) And if an action on the statute be brought by more than one, it is necessary to show how the perjury was prejudicial to each of the plaintiffs. (f) But it seems that a perjury, which tends only to aggravate or extenuate the damages, is as much within the statute as a perjury that goes directly to the point in issue; and that perjury committed in a cause wherein an erroneous judgment is given, is a good ground of a prosecution upon the statute till the judgment be reversed. (g)

It has been holden that every indictment or action upon this statute must exactly pursue the words of it; and, therefore, if it allege that the defendant deposed such a matter *false et deceptivè*, or *false et corruptè*, or *false et voluntariè*, without saying *volun-*

Indictment on  
the 5 Eliz.  
c. 9.

(z) 1 Hawk. P. C. c. 69, s. 20. Bac. Abr. tit. *Perjury* (B).

(a) 2 Roll. Abr. 77. 1 Roll. 79. 3 Keb. 345.

(b) 1 Hawk. P. C. c. 69, s. 21.

(c) Bac. Abr. tit. *Perjury* (B). 1 Hawk. P. C. c. 69, s. 21.

(d) 1 Hawk. P. C. c. 69, s. 22. Bac. Abr. tit. *Perjury* (B). We have seen that this is otherwise at common law. *Ante*, p. 2.

(e) Bac. Abr. tit. *Perjury* (B). 1 Hawk. P. C. c. 69, s. 23.

(f) *Id.* *ibid.*

(g) 1 Hawk. P. C. c. 69, s. 23. Bac. Abr. tit. *Perjury* (B). In 1 Hawk. P. C. c. 69, s. 4, there is a *qu.* whether perjury in a court, whose proceedings are afterwards reversed by error, may not still be punished as perjury, notwithstanding that this is otherwise at common law. See *Reg. v. Meek*, *ante*, p. 21.

*tariè et corruptè*, it is not good, though it conclude that *sic voluntarium et corruptum commisit perjurium contra formam statuti*, &c. Also it is said to be necessary expressly to show that the defendant was sworn; and that it is not sufficient to say that *tacto per se sacro evangelio deposuit*. But there is no need to show whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, '*If persons by subornation, &c., or their own act, &c., shall commit wilful perjury*;' for there being no medium between the branches of this distinction, they seem to be put in *ex abundanti*, and to express no more than the law would have implied, and, therefore, operate nothing. (h)

It seems that if perjury be committed that is within this statute, but the indictment concludes not *contra formam statuti*, yet it is a good indictment at common law, but not to bring the offender within the corporal punishment of the statute. (i)

Any Court, judge, justice, &c., may direct a person guilty of perjury in any evidence, &c., to be prosecuted,

By 14 & 15 Vict. c. 100, sec. 19 'it shall and may be lawful for the judges or judge of any of the superior Courts of common law or equity, or for any of Her Majesty's justices or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder, or deputy recorder, chairman, or other judge holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any county court, or any court of record, or for any justices of the peace in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the Court without leave, and to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the Court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned Court shall specially otherwise direct; and when

and commit the party, unless he enter into recognizance to appear and take his trial, and bind persons to give evidence;

and give certificate of prosecution being directed, which shall be sufficient evidence of the same.

(h) 1 Hawk. P. C. c. 69, ss. 17, 18.  
Bac. Abr. tit. *Perjury* (B), and the  
authorities there cited.

(i) 2 Hale, 191, 192. See the cases  
cited, vol. 1, p. 841; and see vol. 1,  
p. 35.

allowed by any such Court in Ireland such sum as shall be so allowed shall be ordered by the said Court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland: provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.'

Sec. 20. 'In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in law or in equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed.'

Extending the 23 Geo. 2, c. 11, s. 1, (k) to other offences, and simplifying indictments for perjury and other like offences.

An indictment for perjury alleged to have been committed on a trial before the Court of Quarter Sessions, averred in substance that a certain indictment for misdemeanor, &c., came on to be tried in due form of law, and was tried by a jury duly sworn, and the prisoner, as a witness on the trial, was duly sworn, and contained the other usual averments and conclusion. It did not state the nature of the misdemeanor, or aver that the Court of Quarter Sessions had authority to try the same or administer an oath on the trial. Held, that the substance of the offence charged against the defendant was sufficiently stated under this enactment, and that the indictment was good on motion in arrest of judgment. (l)

Sec. 21. 'In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually com-

Extending the 23 Geo. 2, c. 11, s. 2, as to form of indictments for subornation of perjury and other like offences.

(k) This statute is repealed by 30 & 31 Vict. c. 59. It was lamented by a learned judge, that the party prosecuting for perjury did not more frequently avail himself of the 23 Geo. 2, c. 11, made for the purpose of obviating difficulties in drawing the indictments. In the case in which this remark was made, the commission at the admiralty session had been unnecessarily set forth in the indictment; and it was admitted that where a prosecutor undertakes to set out in the indictment more of the proceedings than he need under this statute, he must set them forth correctly; but it was held that the commission at the

admiralty session being set forth as directed to A., B., and C., and others not named, of which number A., B., and C., amongst others, *should always be one*, the Court must take it to mean that if either of the persons named of the quorum were present, it would be sufficient. *Rex v. Dowlin*, 5 T. R. 311.

(l) *R. v. Dunning*, 40 L. J. M. C. 58, *et per* Channell, B., 'This section is almost identical in terms with sec. 1 of 23 Geo. 2, c. 11, except that it omits the words "averring such Court or person or persons to have a competent authority to administer the same."'

mitted, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.'

On trials for perjury and subornation a certificate of the trial of the indictment on which the perjury was committed sufficient evidence of such trial.

Several persons not to be joined in an indictment for perjury.

Venue.

Sec. 22. 'A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken), shall upon the trial of any indictment for perjury or subornation of perjury be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.'

It has been holden, on motion in arrest of judgment, that several persons cannot be joined in one indictment for perjury, the crime being in its nature several. (*m*) But this does not apply to subornation of perjury. (*n*)

With respect to the *venue* in an indictment for perjury, it may be briefly observed that the parish or place, unless used as giving some specific local description, will not be material, and that it will be sufficient to show the offence committed anywhere within the county. The statement of venue in the margin is now sufficient. (*t*) In a case where perjury had been committed in the booth-hall within the limits of the city of Gloucester, which is a county of itself, on the trial of a cause before a jury of the county at large, it was holden that the indictment might be found and tried by juries of the county at large. (*u*) And where perjury had been committed on the trial of an indictment at the Worcester quarter sessions, which were held in the Guildhall at Worcester, which is situate in the county of the city of Worcester, it was held that the indictment, which was found by the grand jury of the county of the city of Worcester, was good, as it was preferred in the county where the oath was actually taken. (*x*) A sufficient venue

(*m*) *Rex v. Philips*, 2 Str. 921.

(*n*) *Reg. v. Rhodes*, 2 Ld. Raym. 886. In *Reg. v. Goodfellow*, C. & M. 569, one defendant was indicted for perjury, and the other for suborning him to commit the perjury, and no objection taken to both being included in the same indictment; and it should seem none could have been successfully taken on that ground, as it is like the case of principal and accessory before the fact, included in the same indictment. C. S. G.

(*t*) See the 14 & 15 Vict. c. 100, s. 23, vol. 1, p. 24. See *Harris's case*

2 Leach, 800; *Rex v. Woodward*, R. & M. C. C. R. 323, vol. 2, p. 924.

(*u*) *Rex v. Gough*, Dougl. 791. In this case a charter had made Gloucester a county of itself, reserving only the trial of matters arising in the county at large within Gloucester as before. The judges intimated their opinions that the indictment might be in either county, but they were clear it might be in the county at large.

(*x*) *Rex v. Jones*, 6 C. & P. 137, Tindal, C. J.

was holden to be laid on the act of taking the false oath in a case where perjury was assigned on an affidavit of an attorney of the Court made in answer to a summary application against him, and where it was objected that it was not stated where the Court was holden when the original application was made, or when the rule was made, calling upon the defendant to answer the charge, it being expressly averred that the defendant 'then and there before the said Court was duly sworn.' (y) In the instance of making an affidavit in the country, the party is not to be indicted where the affidavit may happen to be used, but in the county where the offence was completed, by making the false oath. (z)

The indictment need not state the time at which the offence was committed in any case where time is not of the essence of the offence. (a) Where it is not material, it need not be averred; and if averred, it may be rejected. (b) In a case where an indictment for perjury, charged to have been committed in the defendant's answer to a bill of discovery filed in the Court of Exchequer, alleged that the bill was filed on a day specified, it was holden that the day was not material, as it was not alleged as part of the record: and, therefore, that it was no variance, though the bill, when produced, appeared to be entitled generally of a preceding term. (c) Where the perjury was assigned in answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term, by order of the Court, it was held to be no variance, the amended bill being part of the original bill. (d) So it has been held on an indictment for perjury committed on the trial of a cause at nisi prius to be no variance that the nisi prius record states the trial to have been on a day different from that stated in the indictment, there being no express reference in the indictment to the record. (e)

It is proper to make such a statement by way of inducement as will be sufficient to explain the assignment of perjury, and make it intelligible and consistent. And such statements in the indictment should be made with accuracy. An indictment for perjury stating a bill of Middlesex as 'issuing out of the office of the chief clerk assigned to inrol pleas in the Court,' &c., has been holden to be bad. (f) And if the indictment state that at the assizes, holden before justices assigned to take the said assizes, the oath was taken before A. B., one of the said justices, the said justice then and there having power, &c., it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery. (g)

Allegation of  
time in the  
indictment.

Necessary  
statement in  
the indictment.

Variances.

(y) *Rex v. Crossley*, 7 T. R. 315, ante, p. 3.

(z) By Lord Kenyon, C. J. *Id. ibid.* (a) 14 & 15 Vict. c. 100, s. 24, vol. 1, p. 35. *Rex v. Aylett*, 1 T. R. 69. In *Reg. v. Kimpton*, 2 Cox, C. C. 296, Parke, B., doubted whether an averment of the materiality of a thing occurring on 'Monday, the 29th of June, in the year 1846,' was sufficient after verdict, as the proper course is either to state the year of our Lord, or the year of the monarch's reign; and he left the prisoner to his writ of error.

(b) *Rex v. Aylett*, 1 T. R. 70, 71.

(c) *Rex v. Hucks, cor. Lord Ellenborough*, C. J., 1 Stark. R. 521. And see *Rastall v. Straton*, 1 H. B. 49. *Woodford v. Ashley*, 2 Campb. 193, and 1 Stark. Crim. Plead. 122.

(d) *Rex v. Waller*, Mich. 6 Geo. 1, 3 Stark. Evid. 856.

(e) *Rex v. Coppard*, Moo. & M. 118. 3 C. & P. 59, per Lord Tenterden, C. J., on the authority of *Purcell v. Macnamara*, 9 East, 156.

(f) *Rex v. Scole, Peake*, N. P. R. 112, Lord Kenyon, C. J.

(g) *Rex v. Lincoln*, MS. Bayley, J., and R. & R. 421.

A trial for rape alleged to have taken place at the assizes.

An indictment for perjury alleged that at the assizes holden for the county of Stafford, on &c., at &c., before Sir J. P. &c., 'justices assigned to take the assizes in and for the said county,' one Corns was tried for a rape, and that the prisoner on that trial swore, &c. The record of the former trial stated it to have taken place 'at the assizes and general session of oyer and terminer.' It was objected that the indictment was bad, as an indictment for rape could not be tried under the commission of assize. Greaves, Q. C., doubted whether the indictment was necessarily bad; as the indictment for rape might have been removed by *certiorari*, and tried on the civil side; in which case the allegation that it was tried at the assizes might suffice. (*h*)

It was further objected that there was a variance, as the record produced showed that the trial had taken place in the crown court, and thereupon an amendment of the indictment was prayed. Greaves, Q. C., consulted Williams, J., and they agreed that there was a variance, but that there was no power to amend the indictment under the 9 Geo. 4, c. 15, as the allegation was the statement of a fact, viz. the Court before which the trial took place, and was not the 'recital or setting forth' of 'any matter in writing or print,' within that Act. (*i*)

Imperfect statement of the authority of judges of gaol delivery.

An indictment alleged that a trial took place at a session of gaol delivery before Lord Campbell, chief justice of our lady the Queen, assigned to take pleas before the Queen herself, and Sir E. V. Williams, knight, one of the justices of our said lady the Queen of her Court of Common Pleas, assigned to deliver the said gaol of the prisoners therein. It was objected that the words 'assigned to deliver, &c.,' did not apply to Lord Campbell, but only to Mr. J. Williams; but on its appearing that the record had 'and others their fellow justices assigned to deliver,' &c., Talfourd, J., directed the indictment to be amended. (*j*)

Assizes and gaol delivery incorrect.

Where an indictment for perjury alleged the former trial to have taken place 'at the assizes and general session of the delivery of the gaol,' it was objected that this was an impossible combination of civil and criminal jurisdiction, and Talfourd, J., ordered the word assizes to be struck out of the indictment. (*k*)

Substance and effect.

Where an indictment for perjury, committed in a written

(*h*) See the precedents, 2 Chitt. C. L. 366, 367 (*a*), of indictments for perjury on the trial of causes at the assizes, which are in the form of this indictment; though, according to 3 Bl. C. 60, the commission of assize is to take the verdict of a peculiar species of jury, called an assize. Blackstone also speaks of a commission of assize being issued each circuit; but no such commission is now issued, and the cases tried on the civil side are tried under the commission of assize. And this is according to what Lord Holt said (*Bullock v. Parsons*, 2 Salk. 454), 'The authority of the judge of nisi prius is not by the *distringas*, but by the commission of assize; for it is the 13 Ed. 3, c. 30, which gives the trial by nisi prius, and by that statute the trial by nisi prius is given before justices of assize.' It is clear, therefore, that the

perjury is committed either on a civil or criminal trial at nisi prius on circuit the trial ought to be alleged to have taken place before the justices assigned to take the assizes. C. S. G.

(*i*) Reg. v. Fairburn, Stafford Sum. Ass. 1850. MSS. C. S. G. The prisoner was acquitted, or the points would have been reserved. It seems clear that the amendment in such a case might now be made under the 14 & 15 Vict. c. 100, s. 1, vol. 1, p. 52.

(*j*) Reg. v. Child, 5 Cox, C. C. 197. Spr. Ass. 1851.

(*k*) Reg. v. Child, 5 Cox, C. C. 197. The copy of the record described the court as a general session of oyer and terminer and gaol delivery, and Talfourd, J., ordered the indictment to be amended accordingly.



deposition before a magistrate, in which deposition a word necessary to the sense had been omitted, set out the *substance and effect* of the deposition, and supplied a word which the sense required, as though it were actually in the deposition, the variance was holden to be fatal. (l) And where a count in an indictment undertakes to set out continuously the substance and effect of what the defendant swore upon his examination, it must be proved that in *substance and effect* he swore the whole of what is set out, though several distinct assignments of perjury are made thereon. (m)

Where perjury is assigned upon several parts of an affidavit, and such parts are set out continuously, it is no variance if such parts are separated by other intervening matter, provided what intervenes does not vary the effect of what is set out. An indictment for perjury alleged to have been committed in an affidavit, set out various matters deposed to as if they had been continuous in the affidavit, but on the production of the affidavit, it appeared that the parts set out in the indictment were not continuous, but were separated by the introduction of other matter. It was contended that there was clearly a variance between the affidavit set out in the indictment and that given in evidence. The proper mode of stating it was, 'in one part whereof the defendant swore such and such things, and in another part whereof he swore certain other things.' In actions or indictments for libel such a variance would clearly be fatal. Abbott, C. J., 'In actions or indictments for libel the tenor must be set out; in indictments for perjury it is sufficient to state the substance and effect of the false oath; the variance pointed out is therefore immaterial.' (n) And the same has been held as to evidence given upon a trial. An indictment for perjury committed on the trial of an action for assault and battery, charged the defendant with having sworn that the plaintiff spit in the defendant's face before the defendant struck him, and that he, the defendant in the indictment, had not said certain words, and assigned perjury on both statements. The evidence given by the defendant on the former trial contained all the matter charged as perjury, but other matter intervened between the statement as to the spitting and that as to the words. It was objected that this was a variance, as the evidence charged as perjury in the indictment appeared to have been given continuously; but Abbott, C. J., held it was immaterial, as what intervened did not vary the effect of what was stated. (o)

False statements whether in an affidavit or in evidence may be set out continuously, though matter intervene, if such matter do not vary their effect.

In an indictment for perjury committed before a select com- Mode of stat-

(l) *Rex v. Taylor*, 1 Campb. 104. Ellenborough, C. J. The deposition should have been set out literally, and the meaning explained by an *innuendo*. The indictment stated that the defendant went before a justice of the peace, and swore in substance to the effect following, that is to say, &c., and part of the deposition so set forth was that a person therein named assaulted the deponent with an umbrella, and, at the same time, threatened to shoot her with a pistol; but when the deposition was produced, it appeared that, after stating the assault with the umbrella, it proceeded thus,

'and at the same threatened to shoot,' &c., omitting the word *time*.

(m) *Rex v. Leefe*, 2 Campb. 134. Lord Ellenborough, C. J., *post*, p. 40. It appears, however, that in *Reg. v. Rhodes*, 2 Lord Raym. 886, it was holden, upon an indictment containing only one count, that although all the assignments of perjury but one were bad, judgment should not be arrested. And see *Compagnon v. Martin*, 2 Black. R. 790.

(n) *Rex v. Callanan*, 6 B. & C. 102.

(o) *Rex v. Solomon*, R. & M. N. P. R. 252.

ing election  
returns.

mittee of the House of Commons, it was averred that the election was held by virtue of a certain precept of the high sheriff, by him duly issued to the bailiff of the borough of New Malton; and it was holden that this was not matter of description, and that the production of a precept, which in fact issued to the bailiff of the borough of New Malton, though directed to the bailiff of the borough of Malton, was sufficient. But the indictment also stated that A. and B. were *returned* to serve as burgesses for the said borough of New Malton; and this was considered as a description of the indenture of return, in which the borough was described as the borough of Malton; and the variance was holden to be fatal. (*p*) But where an information for perjury committed before a select committee of the House of Commons, stated that the committee was chosen to try and determine the merits of an election, and that the committee were sworn 'to try the merits of the petition referred to them;' it was held that the committee was well described, although by the 10 Geo. 3, c. 16, s. 13, they were to be a committee 'to try and determine the merits of the return or election.' (*q*)

Committee of  
the House of  
Commons.

Proceedings  
in chancery.

An indictment may be supported upon an answer in a court of equity, though the answer is not correctly entitled and the name of one of the parties be mistaken. Thus where an indictment alleged that Francis Cavendish Aberdeen and others exhibited their bill in the exchequer, &c., and, on the production of the bill, the complainants on the face of it purported to be *J. C. Aberdeen*, and others, it was holden that this was not a variance, and that it was competent to the prosecutor to prove, by other means than by the bill itself the allegation that *Francis Cavendish Aberdeen* did, in fact, exhibit his bill. (*r*) And it was further holden not to be a variance, although after the allegation in question, and after setting out such parts of the bill as were necessary, these words were added, 'as appears by the said bill, &c., filed of record;' on the ground that these words referred to the last antecedent, and could not be considered as incorporated with the prefatory allegation that Francis Cavendish Aberdeen exhibited his bill. (*rr*) And in an indictment for perjury committed in an answer to a bill in chancery, where the bill was stated to have been filed by A. against B. (the defendant in the indictment) and another, though in fact it was filed against B., C., and D., the variance was holden not to be fatal; the perjury being assigned on a part of the answer which was material between A. and B. (*s*) So where an indictment for perjury in answer to a bill in chancery described the bill as exhibited against three persons only, viz., A., B., and C., and the bill when produced appeared to be against A., B., and D.; Abbott, C. J., held that this was not a fatal variance, and that the bill produced must be considered as the same described in the indictment. If the indictment had professed to set forth the title of the bill, such variance would have been fatal, but the bill was substantially described, and that was sufficient. (*t*)

(*p*) *Rex v. Leefe*, 2 Campb. 134.

(*q*) *Rex v. Dunn*, 1 Dowl. & R. 10.

(*r*) *Rex v. Roper*, 6 M. & S. 327. 1

Stark. K. 518. Lord Ellenborough,  
C. J.

(*rr*) *Id. ibid.*

(*s*) *Rex v. Benson*, 2 Campb. 508.  
Lord Ellenborough, C. J.

(*t*) *Rex v. Powell*, R. & M. N. P. R.

So if an indictment for perjury state that there was a suit depending in the Ecclesiastical Court between W. Peacock and R. Miles, and the proceedings in that Court state that the suit was between W. Peacock and R. Miles, *the elder*, this is no variance. (*u*)

Ecclesiastical Court.

Where an indictment alleged that an action was pending 'in the Whitechapel county court of Middlesex, holden at the court-house in Osborn-street, Whitechapel, in the county of Middlesex, &c., before J. M., then and there being the judge of the said court;' and it was objected that the description ought to have been 'the county court of Middlesex holden at Whitechapel, in the county of M.,' in pursuance of the 9 & 10 Vict. c. 95; the Court of Exchequer Chamber held that it did sufficiently appear that the court was held in pursuance of that statute; for it was alleged to be a county court, and held before a single judge. (*v*)

A county court.

It has been holden that, though there be two counts in the original proceeding, an averment that an *issue* came on to be tried is not a variance. (*w*) And where an indictment for perjury alleged that a certain issue in a plea of debt came on to be tried, and that, upon the trial of the said issue so joined between the parties, certain questions became material, &c., but by the record it appeared that three issues had been joined on three pleas; it was objected that it was impossible to know to which of them the averment of materiality referred; but Erle, J., held that 'issue' was *nomen collectivum*, and overruled the objection. (*x*)

Issue is *nomen collectivum*.

And a variance between the affidavit actually sworn, and in which the perjury was charged to have been committed, and the affidavit stated in the indictment, by leaving out the letter *s* in the word *understood*, was holden to be immaterial. (*y*) In a subsequent case, the defendant was tried on an indictment for perjury, committed in giving evidence as the prosecutor of an indictment against A. for an assault; and it appeared that the indictment for the assault charged that the prosecutor had received an injury, 'whereby his life was greatly despaired of; but that in the indictment for *perjury*, the indictment for *the assault*, being introduced in these words, 'which indictment was presented *in manner and form following, that is to say*, and then set forth at length, did not recite the above-mentioned passage correctly, but omitted the word '*despaired*;' upon which the counsel for the defendant admitted that it was not necessary to have recited the indictment for the assault; but he contended that the prosecutor, by the words '*in manner and form following, that is to say*, had undertaken to recite it; and that, having so done, he was bound to set it forth *verbatim*. But the learned judge overruled the objection, and said that the word '*tenor*' had so strict and technical a meaning as to make a literal recital necessary; but that by the words '*in manner and form following, that is to say*,' nothing more was made requisite than a substantial recital; and that the

Variance in spelling words.

(*u*) *Rex v. Bailey*, 7 C. & P. 264, Williams, J. See *Rex v. Peace*, 2 B. & A. 579.

(*v*) *Lavey v. Reg.* 2 Den. C. C. 504. See the indictment, 3 C. & K. 26.

(*w*) *Peake's N. P. C.* 37.

(*x*) *Reg. v. Smith*, 1 F. & F. 98.

(*y*) *Beech's case*, 1 Leach, 133. The

inspection of a record is within the peculiar province of the Court; and, therefore, if a doubt arise as to any word upon a record, the Court and not the jury must resolve that doubt. By Lord Ellenborough, C. J., in *Rex v. Hucks*, 1 Stark.

variance therefore, in the present case, was only matter of *form*, and did not vitiate the indictment. (z)

The substance of evidence given in Welsh may be set out in English in the indictment.

An indictment for perjury alleged that the prisoner falsely swore 'in substance and to the effect following,' and then set out *in totidem verbis* and in the first person a deposition of the prisoner in the English language, but it appeared that the prisoner was examined in Welsh through an interpreter, and that his examination was translated into English, taken down in writing, and signed by the prisoner; and this written deposition was set out in the indictment. It was submitted that the evidence ought to have been set out in Welsh with a translation in English. Williams, J., 'In perjury it is only necessary to prove "the substance and effect."' The indictment charges that the prisoner deposed and swore in substance and to the effect there stated. It was not necessary in this indictment to have set forth the deposition *in totidem verbis*; still the substance and effect of what the prisoner swore in the Welsh language may be proved; and if that is in substance and to the effect the same as is stated in this indictment, that will be sufficient.' (a)

Where an indictment for perjury stated that on an inquiry before two justices of the peace on an information under an excise statute, it became a material question where a certain individual was at 4 A.M. on the 2nd of July, and that the defendant swore she had been in his company from 2 in the same morning until 4, and on the trial for perjury the evidence was that she had said she had been in his company from 11 until 4.30; Parke, J., doubted whether the evidence supported the allegation, but on conference with Bolland, B., he inclined to think it did. (b)

Mode of charging matter sworn in a joint deposition.

If an indictment charge that the defendant swore in substance and effect in a deposition, and the deposition be made jointly by him and his wife, his statement following that of his wife, it will not be a variance. The indictment stated that upon a certain information upon oath, entitled 'the information,' &c., the defendant wilfully deposed in substance and to the effect following: 'the defendant (meaning C. D.) I am certain is one of the persons that assaulted and ill-treated my wife,' &c. The information began, 'The information and complaint of Jane, the wife of C. E. Grindall, and of the said C. E. Grindall, made an oath,' &c. 'And first, the said J. Grindall for herself saith that the defendant is one of the persons who assisted W. J. S. and others in handcuffing and otherwise assaulting me on, &c.' (Signed) 'J. Grindall,' 'And the said C. E. Grindall sworn says, the defendant, I am sure, is one of the persons that assaulted and ill-treated my wife,' &c. It was objected that there was a variance, as the indictment set forth the deposition as sworn by the defendant alone; but it was held that, as what the defendant swore was set out in substance, it was sufficient. (c)

Averment of a conviction.

Where an indictment alleged that the defendant committed perjury on the trial of one B., and that B. was convicted, and it appeared by the record when produced that the judgment against

(z) May's case, *cor.* Buller, J., 1799.  
The learned judge cited Beech's case, *ante*, note (y). See *Rex v. Spencer*, R. & M. N. P. R. 97.

(a) *Reg. v. Thomas*, 2 C. & K. 806.

(b) Anonymous, 1 Lew. 271.

(c) *Rex v. Grindall*, 2 C. & P. 563. Abbott, C. J.

B. had been reversed upon error after the bill of indictment against the defendant had been found, it was held that this was no variance. (d)

Where an indictment for perjury alleged that an officer of excise went before two justices of the peace, and gave the said justices to understand and be informed that 'W. Stock, victualler, *being a brewer of beer or ale for sale,*' did neglect to make a declaration of the quantity of beer brewed; and the words in italics were not found in the information when produced; it was held that this was a fatal variance, as the meaning of the indictment was that 'Stock *being a brewer* neglected.' (e)

Variance between information set out and that produced.

If an indictment use a word of equivocal meaning, the meaning in which it is used must be collected from the context of the sentence in which it occurs. An indictment for perjury alleged that a commission of bankrupt was issued against the defendant, under which he was duly declared bankrupt, and that afterwards he preferred a petition to the chancellor, stating (amongst other things) that a commission had issued, that the petitioner, on the 1st of March, 1821, was declared bankrupt, and that at the several meetings *before the commission* the petitioner declared that the bill of exchange (on which the commission had issued) was not due, &c. But the allegation in the petition was that at the several meetings *before the commissioners* the petitioner declared that the bill was not due. It was contended that the words 'commission' and 'commissioners' were not convertible terms; that the word 'commission' denoted the authority under which the parties acted, and therefore the variance was fatal. Abbott, C. J., 'The objection is that there is a variance between the petition set forth in the indictment and that which was given in evidence at the trial. Now, in a proceeding of this kind it was not necessary to set out in the indictment *verbatim* the tenor of the petition; it is sufficient if it be set out truly in substance and effect. The petition, as set out in the indictment, purports that at the several meetings before the commission, the petitioner declared in the hearing of the said assignee that the bill of exchange given to G. Drowley for the debt was not due at the time when he struck the docket. Now the allegation in the petition, which was proved in evidence, was that at the several meetings before the commissioners the petitioner declared so and so, and the question is whether that is a fatal variance. The word commission is one of equivocal meaning; it is used either to denote a trust or authority exercised, or the instrument by which the authority is exercised, or the persons by whom the trust or authority is exercised. And if it may denote the persons exercising the authority, we must collect from the context of the sentence in which the words "before the commission" occur, and of the other parts of the petition, whether it was used in that sense or not.' After stating the indictment the chief justice proceeded, 'Now, if the word commission as there used was intended to denote the commission itself, it would follow that the several meetings took place before any commission issued; but that is impossible, because in that

Variance. Where an indictment uses an equivocal term, its meaning is to be collected from the context, and by that it is to be determined whether or not there be variance.

case the petitioner could not have made his declaration in the hearing of the said assignee. Then, if that cannot be the meaning of the word commission, we must construe it in the other sense, which it is capable of bearing, namely, as denoting the persons to whom the authority was given; and if it be so construed, there was no variance between the petition set forth in the indictment and that which was given in evidence; the consequence is, that there must be judgment for the crown. (*f*)

The Court may order variances to be amended.

The 9 Geo. 4, c. 15, s. 1, authorizes the Court to cause the record in any indictment for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, to be amended. This Act and the cases upon it, as well as the 14 & 15 Vict. c. 100, will be found in vol. 1, p. 52.

Averment that the complaint was heard, &c.

In a case where a complaint having been made *ore tenus* by a solicitor, before the chancellor in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that, 'at and upon the hearing of the said complaint,' the defendant deposed, &c.; and this was holden to be a sufficient averment that the complaint was *heard*. (*h*) And it has been holden that an indictment for perjury, assigned on an affidavit sworn before the Court, need not state that the affidavit was filed of record, or exhibited to the Court, or in any manner used by the party. (*i*)

Before whom a trial may be alleged to have taken place.

An indictment for perjury may state the trial to have taken place either before the judge, who in fact tried the case, or before the judges before whom it is considered in point of law to have taken place. Therefore an indictment for perjury, stating the trial to have been before two judges, but the oath to have been taken before one of them, is good. The indictment alleged the trial before both judges then in commission, and then alleged that the prisoner was sworn before one of the justices aforesaid; and, on a case reserved on the question whether the oath ought not to have been alleged to have been taken before both justices, the judges were unanimously of opinion that the conviction was right. (*j*) So an indictment for perjury on the trial of a cause at the sittings after term, stating the trial to have been before the puisne judge, who in fact tried the cause, is good, although the *postea* states the trial to have been before the chief justice. An indictment for perjury, charged to have been committed on a trial at the sittings after term in London, alleged the trial to have taken place before Littledale, J.; and on producing the record it did not appear before whom the trial took place, but the *postea* stated it to have been before the lord chief justice; in point of fact, however, the trial took place before Littledale, J.; and it was objected that this was a variance; it was answered that there was no reference in the indictment to the record, and no *prout patet per recordum*: it was merely stated that the trial took place before Little-

(*f*) *Rex v. Dudman*, 4 B. & C. 850.

(*h*) *Rex v. Aylett*, 1 T. R. 70.

(*i*) *Rex v. Crossley*, 7 T. R. 815. Nor is it necessary to prove such facts. *Id.* *ibid.* And see the cases, *post*, p. 98. But it is otherwise when the proceeding is under the statute of 31 Geo. 3, c. 31.

Plead. 121. And see 3 Stark. Evid. 857, citing *Rex v. Taylor*, Skin. 403, where it was held that the bare making of the affidavit without producing or using it is not sufficient.

(*j*) *Rex v. Alford*, 1 Leach, 150. See this case, *post*, p. 47.

dale, J., and that was proved. Lord Tenterden, C. J., 'On a trial at the assizes the *postea* states the trial to have taken place before both justices; it is considered in law before both, though in fact it is before one only, and I am not aware that the *postea* is ever made up here differently when a judge of the Court sits for the chief justice. I cannot stop the case upon such an objection; you may have leave to move upon this point in case it shall become necessary.' (*k*)

Where a trial was had in the old county court it was necessary to allege that the trial was had before the suitors, and to set out the names of the suitors; and therefore it was erroneous to allege that the trial took place before the sheriff and suitors. (*l*)

The indictment alleged that an issue was tried before the sheriff of the county of Durham, by virtue of a writ to him directed, and that upon the trial of that issue the prisoner was duly sworn before the said sheriff. By the writ of trial, return, and the record, the issue did appear to have been tried before the sheriff of Durham; but by the parol evidence it appeared that the issue was not tried before the sheriff or under-sheriff, and that neither of them was present, but that it was in fact tried before Mr. S., who was stated to be the deputy of the high sheriff; but no appointment of Mr. S. was put in, nor was his office more particularly described. Wightman, J., was disposed to direct an acquittal, on the ground that the variance was fatal; but, upon being informed that it was the invariable practice when writs of trial were directed to the sheriff, to make up the record as if the trial had been before him, though in fact it was before some deputy, he thought it better to allow the trial to proceed, and the prisoner was convicted; and, upon a case reserved, the majority of the judges held that the conviction was right. (*m*)

So where an indictment for perjury alleged that upon the execution of a writ of trial directed to the sheriffs of the city of London, certain issues came on to be tried and were tried before the sheriffs of London, and that the defendant came before the said sheriffs, and before the said sheriffs was duly sworn, and it appeared that the trial took place before the secondary and not before the sheriffs, the Court of Queen's Bench held, on the authority of the preceding case, (*n*) that the trial was properly alleged to have taken place before the sheriffs. (*o*)

Where an indictment alleged a trial for felony to have taken place at a session of oyer and terminer and gaol delivery, before Lord Campbell and Mr. J. Williams, and the trial had in fact taken place before Greaves, Q.C., in the grand-jury room at Stafford during the assizes, and his name was not mentioned in the copy of the record which was produced; but the usual words 'and others their fellows, justices assigned, &c.' were therein, and it appeared that Greaves, Q.C., was a justice of the peace for Staffordshire. It was objected that there was nothing to show that Greaves, Q.C., had jurisdiction to try the case. Talfourd, J., said that if the trial had taken place in this Court before a person

Trial before the former county courts.

Where a trial is had before a deputy of a sheriff, it may be averred to have been had before the sheriff.

A trial before the sheriffs of London.

A trial for felony took place before a Q.C. in a grand-jury room; the copy of the record stated the trial before two judges and others, their fellows, &c.

(*k*) *Rex v. Coppard*, Moo. & M. 118.  
3 C. & P. 59. Acquittal.

(*m*) *Reg. v. Dunn*, 2 M. C. C. R. 297.  
1 C. & K. 730.

(*l*) *Jones v. Jones*, 5 M. & W. 523.  
See *Reg. v. Fellowes*, 1 C. & K. 115.

(*n*) *Reg. v. Dunn*.  
(*o*) *Reg. v. Schlesinger*, 10 Q. B. 670.

in the robes of a judge of assize, and acting as a judge of assize, he would not require any proof of his authority; but Mr. Greaves sat in the grand jury room, and being a magistrate for the county, might, it was just possible to suppose, have acted in that capacity. There was nothing on the face of the documents to show that he had any authority; he therefore thought the objection so formidable that he would, if necessary, reserve the point. (p)

How an application to the Queen's Bench must be stated.

An indictment alleged that a cause was depending, and that an application was made to Lord Denman, the Lord Chief Justice of Her Majesty's Court of Queen's Bench, and the other judges of the said Court, and the said judges granted a rule *nisi*, which rule, or an office copy thereof, was set out; and Parke, B., held that the indictment was bad, as the application could only be made to the Court, and it ought to have been so stated, and it did not appear by this indictment that the application was made to a tribunal having jurisdiction to grant it. (q)

Variance in stating the adjournment of a quarter sessions.

If an indictment for perjury committed on a trial before the sessions alleges an adjournment to have been made by certain justices, and the record states it to have been made by other justices, this is a variance; but the defect may be cured by proving that in fact the adjournment was made by the justices named in the indictment. An indictment for perjury on the trial of an indictment for an assault alleged an adjournment to have been made by Const. and A. B., and others their fellows, justices, &c. The examined copy of the record of the conviction stated the adjournment to have been made by Const. and E. F., and others, their fellows, justices, &c. It was contended that this was a fatal variance; and Abbott, C. J., held that it was; but that the defect might be cured by other evidence, as by calling some person who could state that he was present and saw the justices named in the indictment present on the day in question. (r)

The indictment must state that the defendant was duly sworn, &c.

It is sufficient to state in the indictment that the defendant was *duly* sworn. (s) In a case where it was averred that he was *sworn on the Gospels*, and he appeared to have been sworn according to the custom of his own country, without kissing the book, it was

(p) Reg. v. Child, 5 Cox, C. C. 197. But see Reg. v. Dunn, *supra*.

(q) Reg. v. White, 2 Cox, C. C. 232. It was suggested that the rule ended as usual 'By the Court;' which cured the defect. But Parke, B., held that that was not so; what was set out was the 'rule or an office copy thereof.'

(r) Rex v. Bellamy, R. & M. N. P. R. 171. In order to remedy the defect, a witness from the office of the clerk of the peace produced a minute book, which contained an entry, not drawn up in any formal manner, of the names of the particular justices who were present at the day of adjournment mentioned in the indictment, and amongst whom were all the names mentioned in the indictment: these minutes were made by a clerk in the same office, of the name of Richards, whose duty it appeared to be to attend at the quarter sessions, for the purpose of making these entries at the time; but Richards was not called as a

witness, and there was no evidence to show whether he was present on the particular day further than the entry itself. In the same book, on the opposite page to the entry already stated, was another, drawn up by the witness who produced the book; and this was in the form of a record, and was in fact a summary of all the names of the justices attending upon the quarter sessions upon each day during the sessions, but it did not distinguish who was present upon any particular day; amongst these names also were the justices mentioned in this indictment. But Abbott, C. J., held that this evidence was not sufficient to supply the defect; the minutes made by Richards were not a record, or in the nature of a record, and the entry on the opposite page was insufficient, as it did not give the names of the justices who were present on the particular day.

(s) Rex v. McCarthur, Peake's N. P. C. 175. Lord Kenyon, C. J.



considered as a fatal variance; though it was holden that the averment was proved by its appearing that he was *previously* sworn in the ordinary mode. (t) An indictment for perjury in a cause tried at the assizes was holden good, although it alleged the oath to have been taken before one only of the judges in the commission, and the *nisi prius* record imported that the trial was before the two judges of assize. (u)

An indictment at common law, which charged that the defendant, 'falsely, maliciously, wickedly, and corruptly swore, &c., was holden sufficiently to imply that the offence was committed *wilfully*; (v) but it was considered at the same time that, in an indictment on the 5 Eliz. c. 9, the offence must be laid expressly to have been wilfully committed. (w)

Wilfully and corruptly.

The indictment should aver that the defendant '*wilfully and corruptly*' swore, and every count should expressly state that the defendant was sworn, and the fact of his having been sworn cannot be taken by intentment. The first count stated that the defendant on the trial of an indictment against J. H., intending to injure J. H., and to cause him to be wrongly convicted, appeared as a witness and was sworn, and 'then and there falsely and maliciously gave false testimony against J. H., by then and there deposing and giving evidence,' &c. The fifth count, the only one that differed materially from the first, alleged that by means of the false testimony in the first count mentioned, J. H. was found guilty; that a rule *nisi* for a new trial was granted; that the defendant, intending to hinder the said rule from being made absolute, came before a commissioner and was sworn, and being so sworn, wickedly, wilfully, and corruptly did depose, swear, and make affidavit in writing, in substance that the evidence which he, J. S., had given on the said trial was true; whereas the evidence which the said J. S. had given on the said trial was not true, but was false in the particulars in the said first count of this inquisition assigned and set forth. The defendant having been convicted, a rule was obtained for arresting the judgment, and after argument Abbott, C. J., delivered the judgment of the Court as follows:—'I am of opinion that this rule must be made absolute. As to the first class of counts the objection is that they do not charge that the defendant swore wilfully or corruptly. Every definition of perjury is swearing wilfully and corruptly that which is false. Whether the word maliciously might supply the place of either wilfully or corruptly, it is not

The indictment should state that the defendant swore *wilfully and corruptly*, and every count should aver that the defendant was sworn.

(t) Id. *ibid*.

(u) *Rex v. Alford*, 1 Leach, 150. MS. Bayley, J. Eyre, B., doubted on the trial whether one commissioner of assize alone had competent authority to administer the oath, and conceived the indictment ought to have alleged the oath to have been taken before both the judges in the commission, but on a case reserved the judges were unanimous that the indictment was right. See this case, *ante*, p. 44. But as to a record in the Crown Court, see *Rex v. Liucolin*, *ante*, p. 37. In *Reg. v. Deman*, 2 Ld. Raym. 1221, an exception was taken to an indictment;

that it stated the trial at which the oath was taken to have been before the Lord Chief Baron and the associate, but stated the oath to have been before the Chief Baron, without the associate; and also, that the assignment of perjury differed from the oath, being before the Chief Baron and associate. But the objections were overruled; and the Court held that the associate need not be mentioned in every part of the indictment where the Chief Baron was mentioned.

(v) As to the offence being *wilful*, see

(w) Cox's case, 1 Leach, 71.

necessary to determine, for neither of those words is found in the counts in question, and *Cox's case*, (x) which has been referred to, proves at all events that such counts are insufficient. I now come to the consideration of the last count. It is in a form perfectly novel; it was intended to allege perjury in an affidavit made in this court. In the ordinary course of pleading, the first step would have been to charge that there had been a trial, and that the defendant was sworn as a witness; the second, that he swore such and such things; the third, that the matter was false; and so on. Here there is no distinct averment that the defendant was sworn as a witness, or of what he swore. But the fact of his having been sworn must be taken by intendment. Were we to do that, as we are desired to do, in support of this indictment, we should furnish a precedent for a very loose and insufficient mode of charging a very serious offence, which has always hitherto been required to be charged with great certainty and particularity. I think that these novel attempts in pleading are not to be encouraged, and that the judgment must be arrested. (y)•

'Feloniously' swore is bad.

Where an indictment for perjury alleged that the prisoner 'feloniously' swore to the matter on which the perjury was assigned instead of 'falsely,' it was held that the indictment was bad in substance, and that the words 'corruptly, knowingly, wilfully, and maliciously,' did not supply the defect: a man might swear 'corruptly' under some corrupt influence, and yet swear the truth; so with respect to the word 'knowingly;' and he might swear 'wilfully and maliciously' to gratify some malicious feeling, but yet it might not be 'falsely.' Nor did the conclusion that the prisoner 'in manner and form aforesaid did commit wilful and corrupt perjury' cure the defect; for the meaning of that was, that the prisoner committed the offence in the manner stated, and, that statement being defective, the indictment was bad. (z)

That the person had authority to administer the oath.

It must appear or (a) be alleged in the indictment that the person by whom the oath was administered had competent power to administer it. Thus upon an indictment for perjury before a justice in swearing that I. S. had sworn twelve oaths, where the charge as stated did not import that the oaths were sworn in the county for which the justice acted, Eyre, J., arrested the judgment; because as the charge did not so import, the justice had no jurisdiction to administer the oath in question to the defendant. (b)

Is 'sufficient' equivalent to 'competent authority'?

Where an indictment for perjury alleged that two judges had 'sufficient authority' to administer the oath, it was doubted whether it was sufficient, as the 23 Geo. 2, c. 11, s. 1, has only 'competent authority.' (c)

A judge of one of the superior courts at

An indictment for perjury alleged that W. U. had done business as an attorney for the defendant and J. I. on the retainer of

(x) *Supra*, note (w).

(y) *Rex v. Stevens*, 5 B. & C. 246. The 5 Eliz. c. 9, s. 6. *ante*, p. 24, uses both the words 'wilfully and corruptly,' and therefore it should seem that both these words must be used in an indictment on that statute. C. S. G.

(z) *Reg. v. Oxley*, 3 C. & K. 317. Cresswell, J., after consulting Alderson, B.

(a) See *R. v. Dunning*, 1 R. 1 C. 1 R.

290.

(b) *Rex v. Wood*, Exeter, 1723. MS. Bayley, J.

(c) *Reg. v. Child*, 5 Cox, C. C. 197. Talfourd, J., declined to stop the case, but would have reserved the point had not the prisoner been acquitted. This enactment is now repealed, see *ante*, p. 35, and see the present enactment 14 & 15 Vict. c. 100, s. 20, *ante*, p. 35.

the defendant, and that afterwards, to wit, on the 7th of August, 1844, the said W. U. delivered a bill of costs to the defendant and J. I., and that no application was made to the court, in which the said business was done, by the defendant or J. I. within one month after the delivery of the bill, nor did the said court or any judge within one month next after the delivery of the said bill refer the said bill to taxation; and that after the expiration of one month, to wit, on the 25th of April, 1845, W. U. applied to one of the judges of the said court to refer the said bill to be taxed, and thereupon on the said 25th day of April the said judge issued a summons, requiring the defendant and J. I. to show cause why the said bill should not be referred to the master to be taxed; and that before showing cause the defendant went before a commissioner and made an affidavit denying the retainer of the said W. U. It was objected that 'month' in the indictment meant lunar month; and as the jurisdiction to tax the bill on the application of the attorney did not arise under the 6 & 7 Vict. c. 73, ss. 37 & 48, until after one calendar month after the delivery of the bill, the indictment did not show jurisdiction to issue the summons. But the Court of Exchequer Chamber held that the objection ought not to prevail; and Parke, B., in giving the judgment, said, 'Although the word "month" would, in our opinion, if unexplained, signify lunar month, enough is stated to show the judge's jurisdiction; for, as the dates are material, they may be taken without the videlicet, and taken to be true. But I do not think the indictment would be bad even if it contained nothing to show that a calendar month had elapsed before the summons issued; for the judge had general jurisdiction, and must be taken to have had jurisdiction in the particular case unless the contrary appear. I think in such a case the jurisdiction would be intended: but it is not necessary to decide the point.' (d) The third and fourth counts of the same indictment omitted to allege that no application had been made to the court or a judge to tax the bill by the defendant or J. I., and it was urged that these counts were bad by reason of such omission, as by sec. 37 of the 6 & 7 Vict. c. 73, the jurisdiction of the courts to refer such a bill to taxation upon the application of the attorney depended on the fact that no application had been made within the month by the party chargeable; but the Court of Queen's Bench held that the judge had jurisdiction, after the expiration of the month which was alleged in the counts, to issue a summons at the instance of the attorney, calling on the party chargeable to show cause why the bill should not be taxed, although it might be true that if it had appeared on showing cause that a previous application within the month had been made by the party chargeable, the judge might not have had jurisdiction to make an order for taxation. Therefore the affidavit of the defendant, made after such summons, was made in the course of a judicial proceeding. (e)

Where a statute requires an act to be done by justices of the peace acting for a particular division in petty sessions, an indict-

Westminster has general jurisdiction by statute as to the taxation of costs. It is not, therefore, a condition precedent to the legality of a summons calling on a client to show cause why an attorney's bill should not be referred to taxation, that the judge should ascertain whether there had been a previous application by the party chargeable; that may be ascertained afterwards. If therefore an indictment for perjury, committed in an affidavit made in answer to such a summons, merely states that the judge had issued the summons, that would be sufficient.

Perjury at a petty sessions of justices

(d) Ryalls v. The Queen, 11 Q. B. 178. The Court of Queen's Bench had held that as all the counts referred to the Act of Parliament, the word 'month' in the

indictment must be construed according to the clause in the Act to mean calendar month.  
(e) Ibid.

acting for a particular division of a county.

Indictment held bad for not showing that there was a charge made before a justice.

An indictment for perjury, stating that the prisoner came before a magistrate, and maliciously deposed, swore, charged, and gave him to be informed that C. F. E. had a venereal affair with a donkey, shows sufficiently a proceeding

ment for perjury committed before two such justices must allege that they were acting for such division, but need not aver that they were assembled in petty sessions. (*f*)

Where an indictment for perjury stated that the prisoner, maliciously intending to subject W. Mortiboy to the punishments of felony and larceny, went before J. C. and H. H., two justices of the peace, and was sworn (J. C. and H. H. having competent power, &c.) and deposed in substance that on Wednesday last he (the prisoner) was in W. M.'s Peg Alley, and that he (the prisoner) put his hand into his watch fob, and took out a 5*l.* note to make a bet with W. M., and put it into his breeches pocket. That W. M. collared him, and knocked him down, and put his knee on him, and then put his hand into his (the prisoner's) pocket, and took the said 5*l.* note, &c. It was submitted that the indictment was bad, as it did not show that there was any proceeding pending before the magistrate, or that this was a deposition on any charge of felony. Coleridge, J., 'There might be cases of an affidavit, where there was no charge, and no prosecution, and, indeed, no cause in hand. It might have been averred that the defendant made a charge, and that in support of that charge the deposition was made. If the defendant had merely come before the magistrates to swear this, without more, it would not be perjury. I think that the indictment is not sufficient.' (*g*)

The first count stated that the prisoner, meaning to subject C. F. E. to the punishment provided for persons guilty of felony, &c., went and was sworn before a justice of the peace for the county having competent authority to administer the oath, and being so sworn then upon a certain information and examination, entitled 'County of Oxford to wit: the information and examination of R. G. taken upon oath before me, &c.,' falsely, &c., did depose, &c. The whole of the information was then set out; it contained the following passage:—'I then went and got over Mrs. Calcut's wall into the close, and went and looked over the wall between her close and Mr. E.'s ox-pens. I then saw the donkey standing with its side towards and near to the manger of the second pen, with her head towards Mrs. Calcut's close. Mr.

(*f*) Reg. v. Rawlings, 8 C. & P. 439, Park, J. A. J., and Patteson, J., after time taken to consider the points.

(*g*) Reg. v. Pearson, 8 C. & P. 119. When the objection was first made, Coleridge, J., said, 'This might have been the original information. Might it not be that this statement to the magistrates was the charge?' And it is conceived that this was the correct view of the case. In cases of felony and misdemeanor it is a very common practice for the party complaining to state the facts to the magistrate's clerk, who takes them down in the shape of an information; such information is then taken to the magistrate, and the complainant sworn to the truth of it: in such cases it is conceived the making the charge before the magistrate, and the making the deposition, is one and the same thing; it could not, therefore, be averred and proved that the party made

the charge, and *in support of it* made the deposition. See *Caudle v. Seymour*, 1 Q. B. 889, where some strong observations were made against the propriety of such a practice. It may, however, be questionable whether such a mode of taking the information would afford any ground of defence to the party who was sworn to its truth. It may be observed, also, that although it may admit of doubt whether this deposition disclosed a felony, yet as it clearly showed an assault, the magistrate had jurisdiction to administer an oath. In Reg. v. Bradley, Stafford Spr. Ass. 1844. MSS. C. S. G. Coleridge, J., said, that in the discussion of Reg. v. Gardiner, *infra*, considerable doubts were entertained among the judges whether Reg. v. Pearson was rightly decided. See *R. v. Crawley*, 12 Cox, C. C. 162; *R. v. Lewis*, 12 Cox, C. C. 163.

C. E. was standing behind her. I saw that he had the flap of his trowsers unbuttoned and hanging down. I saw the corner of the inside of it; he was rather on the move; he appeared to be on the donkey (meaning that he appeared to the said R. G. to be in the actual commission of that detestable crime, &c.). He remained in that position about five minutes, when the donkey kicked Mr. C. E.'s leg, upon which he moved aside, turning his back rather more towards me than it had been, and stooped down to rub his leg; he then lifted himself up again, and turned round with his face towards me. I then saw his private parts exposed: I saw him tuck up his shirt and button up his trowsers: the upper part of them as well as the flap had been unbuttoned.' This count contained no averment as to the materiality of any of the matters deposed to. It contained several assignments of perjury. Those on which the prisoner was found guilty were as follows:— 'Whereas in fact the said C. F. E. then and there had not the flap of his trowsers unbuttoned or hanging down. And whereas the said C. F. E. had not then and there, or at any other time or place whilst standing behind the said donkey, or any other donkey, the flap of his trowsers unbuttoned, and hanging down, nor had the trowsers the said C. F. E. then wore any flap whatsoever. And whereas the said C. F. E. did not appear to the said R. G. to be, nor was he, then and there, or at any other time, or at any other place, in the actual commission of that detestable crime, &c., with the female donkey aforesaid, or with any other animal, or in any other manner whatsoever. And whereas the said C. F. E. did not remain in that situation for about five minutes, nor did the said donkey kick the said C. F. E.'s leg, nor did, &c., &c. Here followed a number of other averments, which were not proved for want of two witnesses. The third count was the same as the first, except that it stated the prisoner's intention to be, to subject C. F. E. to the punishment, inflicted on persons guilty of misdemeanors, and the innuendo was, that C. F. E. was attempting to commit the offence. The seventh count stated, that the prisoner, intending to aggrieve C. F. E., 'came before Mr. Rawlinson, and was sworn (he having authority), and falsely, &c., did depose, swear, charge, and give the said justice to be informed that the said C. F. E. upon, &c., had a venereal affair with a certain animal called a donkey, and feloniously and against the order of nature did commit and perpetrate that detestable and abominable crime, &c., with the said donkey. And further (it being then and there material to the inquiry into the said charge and information to know the state of the said C. F. E.'s dress at the time the alleged offence was so charged to have been committed as aforesaid) that he, the said R. G., then and there saw that the said C. F. E. then and there had the flap of his trowsers unbuttoned and hanging down, and that he, the said R. G., then and there saw the inside of the said flap; whereas the said R. G. did not then and there, or at any time, or at any place, see the said C. F. E. at any time in the act of having a venereal affair with a donkey, or with any other animal whatsoever, nor did the said C. F. E. then, or at any time, or at any place, or in any manner commit, nor was the said C. F. E. at any time, or at any place, or in any manner in the act of committing that detestable and abominable

before a  
magistrate to  
make the false  
swearing  
perjury.

crime. And whereas the said R. G. did not then and there see the flap of his, the said C. F. E.'s, trowsers unbuttoned or hanging down, nor was the flap of the said C. F. E.'s trowsers then and there unbuttoned or hanging down, nor did the said R. G. then and there see the inside of the flap of the said trowsers. The information signed by the prisoner was put in, and it was proved that he was duly sworn, and that the charge was dismissed. The two witnesses, produced to the facts, were C. F. E., a lad of fifteen, and his elder brother, J. H. E. They swore that they went together to the field, J. H. E. having a gun; that they spoke of going to Chipping Norton, and that Charles went to see whether the donkey was able to go to Chipping Norton, and parted from his brother for that purpose—that he was absent three minutes—that the trowsers he had on, which were produced in court, had no flap. These were the only facts to which they both spoke. C. F. E. fully negatived what the prisoner had sworn to, in a manner quite satisfactory to the jury. J. H. E. also stated that he was about forty yards from the ox-pens—that he had his back towards them—that if he had turned round he could have seen them and the wall, and must have seen if any one was looking over it, but he did not turn round. It was objected, first, that the first and third counts did not distinctly show any proceeding pending before the magistrate; that they ought to have averred directly that a charge was pending. *Reg. v. Pearson. (h)* But Patteson, J., thought that case distinguishable, because of the words 'upon an information and examination,' &c. *(i)* Second, that the flap of the trowsers being unbuttoned did not appear on the face of the counts to be material, and there was no averment of its materiality. The same objection applied to the precise time of five minutes. Third, that the assignment of perjury as to the main charge was too large, because it denied all animals and all times and places. Fourth, as to the first count, that the language used by the prisoner as there set out, did not import that a felony was committed, but only an attempt. These objections were urged in arrest of judgment. Fifth, as to the seventh count, the first objection to the first and third counts was urged. Sixth, to the same count it was urged that, although in that count the state of C. F. E.'s dress was averred to be material, yet, that by such averment was meant—not whether the flap of his trowsers was unbuttoned—but the trowsers generally. Seventh, that the seventh count alleged, that the prisoner charged the capital offence, whereas, by his information, he appeared to have charged only an attempt. The sixth and seventh objections were taken before the verdict, and did not apply in arrest of judgment, as was also the objection, whether the evidence of J. H. E. went to any material fact sufficient to satisfy the rule as to two witnesses in cases of perjury. On all these questions, the learned judge requested the opinion of the judges, and all the judges present held the conviction good on the seventh count, and most of them appeared to think it good on all the others. *(j)*

Insufficient

Where an indictment stated that 'heretofore, to wit, on, &c.,

*(h)* *Ante*, p. 50.

2 Chitty's Crim. Law, 443.

*(i)* The present indictment is in the same form as the one in 4 Wentw. 244.

*(j)* *Reg. v. Gardiner*, 2 M. C. C. R. 95, 8 C. & P. 737.

at, &c., before M. G. and T. H. H., two of the justices, &c., came one J. Osborne, and then and there exhibited to and before the said M. G. and T. H. H., so being such justices as aforesaid, a certain information upon oath, and then and there informed the said justices' that certain quantities of stolen silk were found in a certain house; it was held, that this allegation did not sufficiently show that the oath was taken before the said justices, as it was consistent with the allegation that the oath might have been taken before some other justices. (*k*)

allegation of making an information on oath.

Where a count, which charged perjury in an affidavit to hold to bail, made since the 1 & 2 Vict. c. 110, did not state that a writ of summons had been issued when the affidavit was sworn, it was held good; for the affidavit may be sworn before the issuing of the writ. (*l*)

Affidavit to hold to bail before issuing the writ.

Where an indictment for perjury committed under the Interpleader Act set out the issues joined in the Court of Exchequer between A. B. and C. D., the trial at Westminster, the verdict for the plaintiffs, the judgment, the writ of *fiery facias* consequent thereon to the sheriff of Somersetshire, dated the 5th of June, 1841, the warrant, the seizure of the goods of C. D., and the notice on the part of the prisoner to the sheriff not to sell the goods so seized, but to deliver them up to him, the same being his property; and then charged that the prisoner came before a commissioner, and produced an affidavit in writing, and swore to the truth of the matter contained in it; and the affidavit was, that the prisoner having heard that C. D. had certain goods (those seized under the *fiery facias* of the 5th of June), bought them and paid for them on the 1st of June. The sale and purchase were then negatived, and this was the perjury charged. It was submitted that, as there was no allegation that any application had been made under the Interpleader Act, it did not appear that the affidavit was made in a judicial proceeding; and Coleridge, J., held the objection fatal; as for anything that appeared this was a voluntary oath, and not made in any judicial proceeding. (*m*)

Indictment for perjury in an affidavit under an interpleader rule, must allege that there was an application to the court.

Where an indictment for perjury alleged that a certain cause had been depending in the King's Bench, and that such proceedings were had, that a writ of inquiry was duly issued out of the said court, directed to the sheriffs of London to inquire, &c., and that the said sheriffs should make appear the inquisition which they should take thereof before the justices of our said Lord the King at Westminster, and then assigned perjury on the taking of the said inquisition before the secondary; the Court of King's Bench seem to have been of opinion that the indictment was bad, as it appeared that the perjury was committed *coram non judice*; for the writ of inquiry was issued out of the King's Bench, and made returnable in the Common Pleas, and therefore the secondary had no jurisdiction to administer the oath. (*n*)

Writ of inquiry issued out of B. R., returnable in C. P.

(*k*) Reg. v. Goodfellow, MSS. C. S. G. and C. & M. 569. Patteson, J., and Cresswell, J.

(*l*) King v. Reg. 14 Q. B. 31. 3 Cox, C. C. 561.

(*m*) Reg. v. Bishop, C. & M. 304.

(*n*) Pipphet v. Hearn, 5 B. & A. 634. The question arose before the Judicature

Acts in an action for a malicious prosecution for perjury, and the first count set out the indictment for perjury as stated in the text, and the court held that the count was good, for where a man maliciously prefers an indictment for a crime he is liable to an action for it, although the indictment be defective.

Indictment for perjury before commissioners of bankrupt.

If an indictment state that the party had authority to administer the oath, it is sufficient without showing the nature of the authority.

An indictment for perjury committed in the preliminary proceedings before the commissioners of bankrupt under 6 Geo. 4, c. 16, to ascertain whether the party should be adjudged bankrupt or not, it seems would be good, although it omitted to state that there was a good petitioning creditor's debt. (o)

In an indictment for perjury in an affidavit it is sufficient to state that the defendant was sworn before A. B. (A. B. having power to administer an oath) without stating the nature of A. B.'s authority. An indictment for perjury in an affidavit alleged that the defendant did take his corporal oath before F. J. Chell (he the said F. J. Chell then and there having sufficient and competent power and authority to administer the said oath to the defendant in that behalf) and that the defendant did before the said F. J. Chell, as such commissioner as aforesaid, depose, &c. It was contended, in arrest of judgment, that the indictment was bad, as it did not describe the official station of the person before whom the defendant was sworn. It was, indeed, stated that he made affidavit of certain matters before F. J. Chell, as such commissioner as aforesaid; but he had not been before mentioned as a commissioner, and therefore that averment could not cure the defect. The 23 Geo. 2, c. 11, (oo) made it unnecessary to set out the commission of the person before whom the oath was taken, but that did not dispense with the necessity of showing the nature of his office. Abbott, C. J., 'Looking at the Act of Parliament, 23 Geo. 2, c. 11, (oo) we find that all that is required to be set out in indictments for perjury is the substance of the offence charged, and by what court or before whom the oath was taken, averring such court or person to have competent authority to administer the same, without setting forth the commission or authority of the court or person before whom the perjury was committed. It is, therefore, to be considered whether the present indictment has set forth all that is required by the statute. It sets forth the substance of the matter sworn, the person before whom the oath was taken, and avers that he had authority to administer it. The indictment does, therefore, contain all that is required by the words of the statute; and taking into consideration the object of the Act, which was framed to remove the difficulties before felt by reason of the averments and matters which were usually set out in indictments for perjury, we ought not to require more than the words of the legislature have made necessary. When a case of this sort comes on for trial, the prosecutor must prove the situation of the person before whom the oath was taken, and the nature of his authority. I am, therefore, of opinion, that the indictment is sufficient if it contains the name of the person, if the defendant was sworn before a person, or of the court, if he was sworn before a court. There is not, then, any reason for granting this application.' (p)

(o) Reg. v. Ewington, C. & M. 319. See Reg. v. Jones, 4 B. & Ad. 345, *ante*, vol. 2, p. 452.

(oo) This Act is now repealed, see *ante*, p. 35. See the present enactment, 14 & 15 Vict. c. 100, s. 20, *ante*, p. 35.

(p) Rex v. Callanan, 6 B. & C. 102, 9 D. & R. 97. This case having been much relied upon in the following case,

and the record examined, I have thought it right to insert the following statement of the first count, which I took from the record. The indictment stated that C. C., contriving and intending to injure one T. Stevens, and in order to obtain a rule of the court of B. R., whereby it might be ordered by the said court that the said I. S. should show cause why a certain



This case was reconsidered in the following case:—The indictment stated that at the time of the taking of the false oath by J. O. hereinafter mentioned, R. L., F. D. P., and H. S. G., were commissioners acting in the execution of certain Acts of Parliament relating to the duties of assessed taxes in and for the district of the hundred of Knighton, in the county of W., and thereupon heretofore, to wit, on, &c., at, &c., in the district and county aforesaid (at a meeting then and there held by the commissioners aforesaid for the purpose of hearing and determining appeals against the certificate or supplementary charges made by one J. L., crown surveyor in pursuance of the said Acts), a certain appeal of one W. H. of C., in the district and county aforesaid, in due form of law came on to be heard. The indictment then averred that the defendant on, &c., at, &c., appeared before the said commissioners as a witness for and on the behalf of the said W. H., on the hearing of the said appeal, and was then and there sworn, &c., before the said R. L., F. D. P., and H. S. G., so being such commissioners as aforesaid, that the evidence which he the defendant should give upon the hearing of the said appeal should be the truth and nothing but the truth (they the said commissioners then and there having authority to administer the said oath, &c.). The indictment then proceeded to aver the materiality, the giving the evidence, &c. The defendant having been convicted, a writ of error was brought, and one of the errors assigned was, that it did not appear that the said appeal was an appeal against such a certificate as in the said indictment mentioned, or that the same appeal was such an appeal as the said commissioners or any of them had power, authority, or jurisdiction to determine, and if they had no such power, &c., they had no jurisdiction to administer the said oath; and the Court of Queen's Bench held that the indictment was bad upon this ground, and the judgment was reversed. (g)

Where an indictment alleged that 'a certain action of contract,' was pending in a county court, and then alleged that the defendant was duly sworn before the judge of the said court, 'then and there having sufficient and competent authority to administer the

Indictment for perjury on an appeal before commissioners of the assessed taxes must show that the appeal was one they had jurisdiction to try, in order to show they had authority to administer the oath.

It is sufficient to allege that a county court judge had competent authority to

judgment signed on a warrant of attorney in a cause in the said court of Stevens against Callanan, and the execution issued thereon, should not be set aside, and the said warrant of attorney be delivered up to be cancelled, and why the proceeds of the said execution should not be restored to the said C. C., and why the said T. S. should not pay the costs of that application, and that in the meantime the said proceeds should remain in the hands of the sheriff of the county of Middlesex, came in his proper person, &c., on, &c., at, &c., before F. J. Chell, gentleman, and the said defendant then and there, to wit, on &c., at, &c., was duly sworn, and did take his corporal oath upon the Holy Gospel of God before the said F. J. Chell (he the said F. J. Chell then and there having sufficient and competent power and authority to administer the said oath to the said C. C. in that behalf), and the said C. C. being so sworn as aforesaid, falsely, &c., did then and there before

the said F. J. Chell, as such commissioner as aforesaid, depose, swear, and make affidavit in writing, amongst other things, in substance, &c. The indictment then set out the affidavit, which stated, amongst other things, that C. C. had applied to the said T. S. for a loan of 150*l.*, which T. S. had agreed to let C. C. have upon having a mortgage upon his, C. C.'s, house, and as a collateral security a warrant of attorney to accompany the said mortgage, that the mortgage and warrant of attorney were prepared for 250*l.*, although no more than 150*l.* was advanced, &c.: 'all which said several matters and things so deposed and sworn by the said C. C. as aforesaid were, and each of them was material for the obtaining and supporting the said rule.' C. S. G.

(g) Reg. v. Overton, 4 Q. B. 83. Many other errors were assigned, but not determined by the court.

administer the oath without alleging that the cause was within the jurisdiction of the judge.

said oath to her in that behalf,' it was objected that there was no averment that the said action of contract was one over which the county court had jurisdiction, and that no intendment could be made in favour of an inferior court that the action pending in it was one over which the court had jurisdiction; but the Court of Exchequer Chamber held that it did appear by necessary implication that the action was one over which the judge of the county court had jurisdiction; for unless he had, he could not have had power to administer the oath, so as to be valid and binding, which is the true meaning of the phrase. The alleged defect, therefore, in the averment of the substance of the charge was supplied by necessary implication by the averment of the competency of authority in the judge to administer the oath. (r)

So where an indictment for perjury at a quarter sessions in Ireland alleged that a certain civil bill came on to be tried in due form of law before an assistant barrister, and alleged the oath to have been taken before the said assistant barrister, he having sufficient and competent authority to administer the said oath; it was objected that the indictment ought to have stated that the civil bill was for a cause of action within the jurisdiction of the court. But, on a case reserved, it was held, on the authority of the preceding case, that the indictment was good. (s)

An indictment for perjury against an insolvent was sufficient, though it did not allege that he had resided for six months before the filing of his petition within the jurisdiction of the court.

An indictment for perjury alleged that a petition for protection from process was, under and in pursuance of the 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 10 & 11 Vict. c. 102, filed and presented in the county court of Staffordshire at W. by the prisoner; and that the prisoner afterwards duly received an order for protection from process, and that afterwards, whilst the proceedings upon and in respect of the said insolvency were pending in the said county court, to wit, at the time of filing the said petition and schedule, the prisoner came before H. K., at the court at W., and within the jurisdiction aforesaid, for the purpose of making an affidavit and verifying on oath his said petition and schedule (H. K. being a commissioner to administer oaths in chancery, and duly empowered to act in the matter of the said insolvency, and to take the oath of the prisoner), and was duly sworn and took his oath that the affidavit he then made was true (H. K. having competent authority to administer the said oath). The indictment then alleged the materiality of certain matter, and that the prisoner falsely swore in the usual way. It was objected on error that the indictment did not show that there was jurisdiction to administer the oath, as it did not allege that the prisoner had resided within the jurisdiction of the court for six calendar months next preceding the filing of his petition, according to the 10 & 11 Vict. c. 102, s. 6. But it was held that the indictment was good. (t)

(r) *Reg. v. Lavey*, 2 Den. C. C. 504. 17 Q. B. 496. See the indictment, 3 C. & K. 26. *Reg. v. Overton*, *supra*, was mainly relied on, in support of the objection, and the court observed, 'If it were necessary for us to say how we should decide the present case if it were not distinguishable from that, we should require further time for consideration,' and that 'in that case the court considered that there was no reason why the oath was

administered in the course of any judicial proceeding.'

(s) *Reg. v. Lawlor*, 6 Cox, C. C. 187. See *R. v. Dunning*, *ante*, p. 48.

(t) *Walker v. Reg.* 8 E. & B. 439. Wightman, J., said, 'Suppose the petitioner, not so residing, had sworn in his petition that he did; would that be perjury?' It was admitted that it would. Lord Campbell, C. J., 'Then such a petition would give the court jurisdiction

An indictment for perjury alleged to have been committed on the hearing of an appeal against a surcharge under the Game Acts before commissioners of assessed taxes, stated that a notice of appeal had been given to the assessors, and averred that the commissioners were 'duly authorized and empowered to hear and determine' the appeal. It was objected that the commissioners had no jurisdiction unless a notice of appeal had been given to the surveyor or commissioners; it was answered that the indictment alleged that the commissioners had authority, and that the want of notice might have been waived; but Patteson, J., held that the want of notice could not be waived; for the 43 Geo. 3, c. 29, enabled the commissioners to hear the appeal, 'unless such notice shall not have been given,' &c., 'when they *shall* dismiss the appeal.' Without such notice, therefore, the commissioners had no authority to hear the appeal, and it could not make the indictment good to show by evidence that the proper notice was given, when the indictment itself showed the notice to have been an improper one. (u)

It is necessary that it should appear on the face of the indictment that the oath taken was *material* to the question depending. (v) But it is not necessary to set forth in the indictment so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned, and it will be sufficient to allege generally that the particular question became a material question. (w) Thus statements, that, at a court of admiralty sessions, J. K. was 'in due form of law tried upon a certain indictment then and there depending against him' for murder, and that 'at and upon the said trial it then and there became and was made a material question,' whether, &c., were holden to be sufficient averments that the perjury was committed upon the trial of J. K. for the murder, and that the question on which the perjury was assigned was material on that trial. (x) If the materiality of the question evidently appears upon the record, as where the falsehood affects the very circumstance of innocence or guilt, or where the perjury is assigned on documents from the recital of which it is evident that the perjury was important, the express allegation may, it seems, be omitted. (y) And where, upon an indictment for perjury on a trial for felony, it did not appear that the matter sworn was material, nor was it alleged that it was so, the judges held, upon a case reserved, that if the original indictment had been set out, and it could plainly have been collected that the matter was material, it would have been sufficient without an averment of materiality, but that as this was not the case, the indictment was bad. (z) So where upon an indictment for perjury committed in an answer in chancery, the perjury was assigned in defendant's denial in the answer of his having agreed, upon forming an insurance company of which he was director, &c., to advance 10,000*l.*

Indictment had for not showing that a valid notice of appeal had been given under the Tax Acts.

It must appear on the face of the indictment that the oath was *material*, or it must be alleged that it was.

to inquire into the truth of the petition in that respect.'

(u) *Anonymus*, 1 Cox, C. C. 50.

(v) *Rex v. Aylett*, 1 T. R. 69.

(w) *Rex v. Dowlin*, 5 T. R. 311; *Lavey*

*v. Reg.* 2 Den. C. C. R. 504; 3 C. & F. 26.

(x) *Id. ibid.*

(y) 2 Chit. Crim. L. 307 *a*, citing *Trem. P. C.* 139, &c., and *Rex v. Crossley*, 7 T. R. 315. *Ryalls v. Reg.* 11 Q. B. 781. *Reg. v. Cutts*, 4 Cox, C. C. 435. (z) *Rex v. M'Farren*, East. T. 1792, MS. Bayley, J. 5 T. R. 316. S. C.

for three years to answer any immediate calls, and there was no averment that this was material, nor did it appear for what purpose the bill was filed, or what was the prayer, the judgment was arrested. (a)

The indictment must show either by a statement of the proceedings, or by express averment, that the matter sworn was material.

It seems to be fully settled that either it must appear upon the indictment that the matter in respect of which the perjury is assigned was material, or it must be expressly alleged to have been so. An indictment for perjury alleged that on the trial of a certain issue the defendant was sworn as a witness, and that on such trial certain questions became material, that is to say, 'whether one J. Kenworthy had been arrested by one J. Lister; whether the said J. L. had on the occasion of the said alleged arrest touched the person of the said J. K.; and whether the said J. L. had on the occasion of the said alleged arrest put his arms round the said J. K. and embraced him.' The indictment then charged that the defendant swore falsely to the following effect. 'Lister (meaning the said J. L.) put his arms round him (meaning the said J. K.) and embraced him (meaning the said J. K., and meaning thereby that the said J. L. had on the occasion to which the said evidence applied, touched the person of the said J. K.).' It was further alleged that in answer to a question put to the defendant, 'whether the said J. L. did not put his arms round him (meaning the said J. K.) and embrace him,' the defendant falsely swore as follows: 'he (meaning the said J. L.) did' (meaning that the said J. L. did on the occasion to which the said evidence applied put his arms round and embrace the said J. K. and did touch the person of the said J. K.). The defendant having been convicted, a writ of error was brought, and the error specially assigned was that the materiality of the evidence alleged to have been false was not sufficiently averred in the indictment; and it was contended that in the evidence, on which the perjury was assigned, there appeared neither time, place, nor circumstance to connect the statement with the alleged arrest. The whole might have turned upon some former and entirely different transaction. And the innuendoes did not remove the difficulty: for there was no averment in them that it was on the occasion of the alleged arrest; it merely imported that the evidence was given concerning an occasion, which was not identified with that in question. Bayley, J., 'An indictment must be good without the help of argument or inference. In the case of perjury the indictment must show, either by a statement of the proceedings or by other averments, that the question to which the offence related was material. That is not shown here in either way. The words on which perjury is assigned, if taken without the innuendoes, have no necessary reference to the occasion of an alleged arrest; nor is there anything in the indictment to connect them with it. It is contended that the inquiry, to which part of the evidence was an answer, would not have been relevant if applicable to any other matter and occasion than those now in question; but we know nothing of the merits of the case except

(a) *Rex v. Bignold*, Trin. T. 1824. MS. Bayley, J. The indictment was shown to Lord Gifford, M. R., and Mr. Bell, K. C., who both thought that upon the face of the indictment it could not be said whether the question was material or

not; and the materiality of all questions in a chancery suit depending upon the purpose for which the suit is instituted, the court held that the indictment could not be supported. MS. Bayley, J.

from the indictment. The innuendoes rather introduce greater doubt than greater certainty, and lessen the force of the argument that only one occasion could have been contemplated. I am, therefore, of opinion that the indictment is defective, and the judgment ought to be reversed.' (b)

Where an indictment stated that a suit was pending in the Court of Chancery, and that a commission was issued to certain commissioners to examine witnesses upon interrogatories, and then set out the ninth interrogatory, and averred that, 'upon the examination of the defendant upon the said interrogatories, it became, and was, material to ascertain the truth of the matters hereinafter alleged to have been sworn to and deposed by the defendant, upon his oath, in answer to the said ninth interrogatory;' it was objected that the averment of materiality was insufficient, there being no statement of the alleged perjury being material to the chancery suit, or to any question in that suit; and Coleridge, J., expressed some doubt whether the averment of materiality was sufficient, and would have reserved the point if it had become necessary. (c) And where an indictment for perjury, after alleging that an information was exhibited before two magistrates, and that the same information came on to be heard before M. G. and J. S., two justices, and that 'upon the hearing of the said information before the said M. G. and J. S., so being such justices as aforesaid, it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said J. S. upon his oath;' it was held that this averment of materiality was insufficient. (d)

Hewins's case.  
Imperfect  
allegation of  
materiality.

Goodfellow's  
case.

An indictment stated that, on the trial of an action of *Meek v. Knight*, 'it became and was a material question, whether a certain bill of exchange, bearing date,' &c. (here the bill was described) 'was accepted by the said J. Meek, for the accommodation of the said W. Knight, and without valuable consideration to the said J. Meek from the said W. Knight; and whether a certain paper writing or memorandum, then and there produced, by and in the handwriting of the defendant, J. Burraston, was really and truly executed by the said W. Knight, by affixing his mark thereto, at the time of the making of the said bill of exchange. (The indictment then set out the memorandum.) And whether the said memorandum was read over by the said J. Burraston to the said W. Knight, at the time of making the said bill of exchange as aforesaid.' The indictment then alleged that the defendant swore that the said paper writing or memorandum was duly executed by the said W. Knight, by affixing his mark to the same, in the presence of the said J. Burraston, on the day on which the same bears date and at the time of the making of the said bill of

Burraston's  
case.  
Insufficient  
averments of  
materiality  
and of the  
falsity of the  
matter sworn.

(b) *Rex v. Nicholl*, 1 B. & Ad. 21. Littledale, J., and Parke, J., concurred, and Parke, J., added, 'It is part of the definition of perjury that the false swearing is on some point material to the question in issue. In an indictment this may appear either from the matter of the suit, as shown on the record, or by direct averment.'

(c) *Reg. v. Hewins*, 9 C. & P. 786.

The defendant was acquitted. The form of the averment in this and the following case was taken from 2 Chitty's Cr. L. p. 307 a; where it is said that this 'concise statement would, it should seem, in all cases suffice.'

(d) *Reg. v. Goodfellow, Patteson, J.*, after consulting Cresswell, J., C. & M. 569, 1840. See the averment of materiality in *Rex v. Callanan*, ante, p. 54, note (p).

*exchange*, and that the said memorandum was then and there read over by the said J. Burraston to the said W. Knight. 'Whereas, in truth and in fact, the said W. Knight did not execute the said paper writing or memorandum by affixing his mark thereto, in the presence of the said J. Burraston, *on the day on which the same bears date*, nor was the said memorandum read over by the said J. Burraston to the said W. Knight at the time of the making of the said bill of exchange, nor was the said memorandum produced or shown to the said W. Knight by the said J. Burraston, at the time of making the said bill of exchange.' Upon a writ of error, brought after a general verdict of guilty, the errors assigned were, that no perjury was assigned upon the question alleged to have been a material question upon the trial, and that no perjury was assigned upon any question alleged to have been a material question upon the trial; and the Court of Queen's Bench held that the indictment was bad. The assignment of perjury, that the bill was not executed on the day on which the same bears date, departed from the statement of the evidence, and the allegation of the materiality. And the assignment of perjury, that the paper was not executed at the time of the making of the bill, bore no relation to the allegations of the evidence of the defendant. The statement of the evidence of the defendant, as well as the allegation of the falsehood, were uncertain. The words 'then and there' might refer to the two dates, the date of the memorandum and the day of the making of the bill, and it might consist with the fact that it never was read over on both days, or the defendant might never have intended to say that it was. (e)

An averment that 'it then and there became material' is insufficient.

An indictment alleged that E. S. filed his bill in chancery against the prisoner, J. S. S., and J. S., whereby he prayed that a purchase by the prisoner might be declared fraudulent and void, and that he might be decreed to deliver up the contract to be cancelled, and then averred that it *then and there* became a material question whether the prisoner did advise the said J. S., E. S., and J. S. S., that certain real estate, including the premises described in the said bill, should be sold. It was held that the averment of materiality was insufficient. There might be very good reasons for setting aside the sale as fraudulent, quite independently of any advice given by the prisoner; and that being so, the question was whether there was a sufficient averment of materiality, and the words 'then and there' were not sufficient to supply the omission of the words 'in the said suit,' or words to the same effect. (f)

An averment that a question was material

An indictment for perjury alleged that H. L. stood charged before T. Scott, a justice of the peace, with having on the 12th of

(e) Reg. v. Burraston, 4 Jurist, 697. The court expressed strong doubts whether it was possible to separate the three propositions, which were said to have formed one question; and Little-dale, J., said that if it was one assignment of perjury, and part was bad, the whole was vitiated. It was also doubted whether where a matter was stated to be a material question the prosecutor could abstain from stating any swearing as to such matter, or assigning any perjury

upon it. But it became unnecessary for the court to decide either of these points, as the indictment was held bad on the grounds stated in the text.

(f) Reg. v. Cutts, 4 Cox, C. C. 435. Q. B. Lord Campbell, C. J., said, 'An indictment for perjury must either show that the evidence alleged to be false was necessarily material to the issue, or there must be a positive averment that it was material.'

August committed a trespass by entering in the daytime on certain land in pursuit of game, and that upon the hearing of the said charge, the prisoner appeared as a witness for the said H. L., and was duly sworn to speak the truth touching the said charge; and that the prisoner upon the hearing of the said charge, falsely swore that he did not see the said H. L. during the whole day of the 12th of August, and that '*at the time he the said prisoner swore as aforesaid* it was material and necessary for the said T. Scott, so being such justice as aforesaid, to inquire of and be informed by the said prisoner whether he did see the said H. L. at all during the said 12th day of August,' and it was held that the indictment was bad; for 'it is not stated that it was a material and necessary question in the inquiry before the said T. Scott, to which the false and corrupt answer was given. It may have been, therefore, consistently with the averments in the indictment, material and important for T. Scott in some other matter, and not in the matter stated to be in issue before him, to have put this question and received this answer. Now as the offence of perjury consists in taking a false oath in a matter stated to be in judgment before a court or person having competent authority to decide it, and as this indictment does not clearly and distinctly charge that, it does not charge the offence of perjury.' (g)

at the time  
the prisoner  
swore is  
insufficient.

An indictment for perjury committed on a trial for rape alleged that it was a material question whether the prisoner ever got one M. Williams to write a letter for her, and whether or not she saw the said M. Williams at the house of S. Lewis's father when the said letter was written; and that the prisoner falsely swore that she never got a Mr. M. Williams (he being then present in court during the said trial) to write a letter for her, and that she did not see the said Mr. M. Williams at the said house of the said father of the said S. Lewis. Whereas the prisoner did get the said M. Williams to write a letter for her, &c. At the trial for rape, the prisoner was asked whether she ever 'got Mr. M. Williams (who was pointed out to her in court) to write a letter for her. She replied, 'No, I did not.' The letter was shown to her and the question repeated, and she repeated her denial, and she also denied having ever seen M. Williams at S. Lewis's father's house. The falsity of what she so swore was clearly proved and the letter produced. It was objected, 1st, that the materiality of the matters assigned as perjury was not sufficiently alleged; 2nd, that the reference to the letter was too vague and general, and not properly pointed to the particular letter; 3rd, that the references to M. Williams and Lewis's father's house were not properly introduced by an averment; 4th, that the letter produced was not sufficiently identified with the statements on the record to support them. The objections were overruled, and, on a case reserved, it was urged that all the assignments of perjury were defective in not identifying the M. Williams spoken of in them with the M. Williams spoken of in the allegation of materiality; but it was held that the indictment was sufficient: it averred that it was a material question whether the prisoner got any M. Williams to write a letter. That averment comprehended every person

Averments as  
to the materiality  
of a letter, and  
identification  
of a person  
named in the  
averments  
with one  
named in the  
assignments of  
perjury

of the name of M. Williams. The description therefore in this averment was larger than the description in the assignments of perjury, and comprehended the M. Williams there spoken of. As to the objection relating to the letter, it was contended that it could not possibly be material that the prisoner got Williams to write a letter. But it was held that, as there was an express averment that it was material, that let in evidence to prove that it was so, and when the evidence was looked at it was clear that the letter was material. (*h*)

Averment of materiality as to a person insufficiently connected with a person named in the matter sworn.

An indictment for giving false evidence before a commissioner of bankruptcy alleged that upon the examination of the prisoner it was material to inquire what was the extent of the dealings of the prisoner with 'one Mr. Marshall, and how long he had known the said Mr. Marshall,' &c., and then alleged that the prisoner solemnly declared that 'Mr. Marshall is the landlord of No. 4, York-terrace,' &c. 'I have known Mr. Marshall two or three years,' &c. Whereas the said person so described was the same person as one S. Marshall Legge, and was the father of the prisoner, &c. It was objected, in arrest of judgment, that there was nothing to connect the allegation of materiality with the assignment of perjury, as there was no innuendo that Mr. Marshall meant S. Marshall Legge; and the judgment was arrested as the averment of materiality was insufficient to connect it with the other parts of the indictment. (*i*)

An account held sufficiently referred to, though there had been several similar accounts.

An indictment for perjury alleged that a cause came on to be tried before a county court judge, and that it became a material question on the trial whether J. H. Bridges had, in the presence of the prisoner, signed at the foot of a certain bill of account, purporting to be a bill of account between a certain firm called 'Bridges and Co.' and J. Webster, a receipt for the payment of the said bill, and that the prisoner falsely swore that J. H. Bridges did in her presence sign the said receipt; and it was proved that on the trial the prisoner produced an invoice of goods, at the foot of which was a receipt, which purported to bear the signature of Bridges, and the prisoner swore that he in her presence wrote and signed that receipt. Bridges had on other occasions signed receipts in the presence of the prisoner at the foot of invoices. It was objected that the indictment did not sufficiently specify the account and receipt to which the evidence on which the perjury was assigned related; but, on a case reserved, it was held that the indictment was sufficient, as it was only necessary to refer to the receipt as introductory to making out the materiality of the perjury. (*j*)

An averment that it was material whether the prisoner had written some words in the presence of D.

Where an indictment for perjury alleged that the defendant swore that he had not written certain words in the presence of one Dipple, and alleged that it was a material question whether the defendant had so written such words in the presence of Dipple; the Court of Queen's Bench held that the indictment was sufficient; for the question whether the words were written

(*h*) Reg. v. Bennett, 2 Den. C. C. 240; 3 C. & K. 124; 5 Cox, C. C. 207. It is trusted that the text represents substantially the grounds of the decision on the two points; but a Digest of the law is

unsatisfactory. No express notice was taken of the other points.

(*i*) Reg. v. Legge, 6 Cox, C. C. 220. The Recorder, after consulting Parke, B. Reg. v. Webster, Bell, C. C. 154.



in the presence of Dipple might have been material; and it was impossible to assume the contrary against the record. (*k*)

An indictment for perjury on the taking of an inquisition before a coroner alleged that it 'was, upon the taking of the said inquisition, a material question whether,' &c., and it was urged that this statement did not sufficiently show that the question was material to the inquiry; but Parke, B., held that the statement sufficiently imported that the question was material to the subject-matter of the inquisition. (*l*)

An indictment for perjury alleged that it was a material question whether, before the execution of a bond, it was agreed between certain persons that the prisoner should lend W. Winder 1500*l.* before the title to certain premises was investigated by the prisoner, and before any mortgage thereof was executed to secure repayment thereof, and that they should execute the bond to secure the prisoner the repayment of the said sum and interest in case the title should turn out to be defective, or the mortgage should not be duly executed; but if the title turned out to be good, and the mortgage was executed, they were not to be liable on the bond; and then alleged that the prisoner falsely swore that nothing was said by him or in his hearing about the bond being a temporary security, or a security until the mortgage was prepared, '*or anything of the kind.*' It was objected that, according to the agreement as stated, the bond would be binding until the title turned out to be good, which would not necessarily be when the mortgage was executed, so that the bond would not necessarily be a temporary security. But Erle, J., held that the exact terms of the alleged agreement were not material; for the prisoner swore that there was no agreement 'of the kind.' (*m*)

The indictment must show on the face of it that the matter *was* material; it is not sufficient if it only shows that it *might* or might not have been material. An indictment for perjury alleged that, on the trial of an indictment for an assault, with intent to commit a rape, and for a common assault, upon one Ann Bird, the said Ann Bird swore that she was the wife of one J. Bird, and had been married to him at such a time and such a place, whereas she was not the wife of the said J. Bird, and had never been married to him; and the indictment contained an allegation of materiality, which was insensible in consequence of an error in copying it from the draft; it was, nevertheless, contended that it sufficiently appeared on the face of the indictment, that the evidence on which the perjury was assigned was material on two grounds. First, that on any indictment for an assault, with intent to commit a rape, it was most material, not only as affecting the credit of the witness, but as going to the very gist of the charge itself, whether the party assaulted had falsely sworn that she was a married woman. Secondly, that by swearing that she was the wife of J. Bird, the prosecutrix supported the allegation that the assault was upon 'Ann Bird,' which would have failed if she had admitted that she was not married to J. Bird. But Cresswell, J., held that it did not sufficiently appear that the evidence was

An averment that 'on the taking of an inquisition,' it was material, &c.

Question as to the materiality of the terms of an agreement.

Ann Bird's case.

Materiality not necessarily apparent on the face of the indictment.

(*k*) Reg. v. Schlesinger, 10 Q. B. 379.

(*l*) Reg. v. Kimpton, 2 Cox, C. C.

material; it might or might not be material, and that was not sufficient. (n)

Apparent  
materiality of  
an affidavit to  
postpone a  
trial.

Where an indictment for perjury stated that a cause was set down for trial, and appointed for a particular day, and that the defendant in that cause, before that day, made an affidavit before a judge, in which he stated that he had a good defence to the action, which he would be able to prove at the trial, and that some of the bills on which it was brought were void for usury, and then assigned perjury on these allegations; it was objected that the indictment was clearly bad: the only manner in which such an affidavit could be in a judicial proceeding, or the matters contained in it become material, would be upon an application to postpone the trial of the cause; but the indictment did not show that any such application was made or intended. Lord Tenterden, C. J., however, thought that the occasion, on which the affidavit was intended to be used, might be sufficiently collected from the indictment, and refused to stop the trial, as the defendant, if there was any weight in the objection, might have the benefit of it after he was convicted. (o)

Apparent  
materiality of  
evidence set  
out in an  
indictment.

An indictment alleged that an action came on to be tried in a county court, in which the plaintiff claimed to recover a sum for the expenses of a journey, and another sum for wages, and it was thereupon proved, on the part of the plaintiff, that the defendant had made certain statements, which were set out, and by which the debt to the plaintiff was sought to be proved; and afterwards averred that the defendant swore that he had not made any of the said statements; whereas he had made them; but there was no averment of materiality. Byles, J., held that such an averment was not necessary; but that it would suffice if the materiality could be gathered from the whole indictment, and if the assignments of perjury showed upon the face of the indictment that they were material to the issue. And here it appeared, on the face of the indictment, that the statements alleged to be falsely made were material to the issue. (p)

(n) Reg. v. Ann Bird, Gloucester Spr. Ass. 1842. The indictment for the assault simply stated the assault to be upon Ann Bird, without any further description. The learned judge expressed an opinion that the indictment was insufficient before the case went to the jury, but he left it to them, and after they had found the prisoner guilty, arrested the judgment, in order that the prosecutor might bring a writ of error if he thought fit. No writ of error was brought, the prosecutor being unable to incur the expense of such a proceeding. It sometimes happens that upon an objection taken to an indictment before verdict, the judge who tries the case, if he considers the objection valid, directs an acquittal; but the course adopted by the learned judge in this case is certainly the better course, as, if the decision be incorrect where the judgment is arrested, it may be reversed upon error; whereas if the prisoner is acquitted, and the decision is incorrect, there is no means of correcting the error, and as the verdict

of the jury has been taken, it may be very questionable whether if a fresh indictment were preferred a plea of *autrefois acquit* might not be successfully pleaded. See per Lord Tenterden, C. J., Rex v. Fowle, 4 C. & P. 592, *post*. In Reg. v. Purchase, C. & M. 617, tried at the same assizes, Patteson, J., after consulting Cresswell, J., refused to allow any objection to be taken to an indictment for embezzlement, except upon demurrer or in arrest of judgment, and it seems most in accordance with the regular course of proceeding that such a course should be adopted in all cases. C. S. G.

(o) Rex v. Abraham, 1 M. & Rob. 7. The defendant was convicted, but did not appear to receive judgment when called upon, and no motion in arrest of judgment was made.

(p) Reg. v. Harvey, 8 Cox, C. C. 99. It was urged that the omission of an averment of materiality was a mere formal defect, and amendable under the 14 &

It is also necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant. And the general averment that the defendant falsely swore, &c., upon the whole matter, will not be sufficient: the indictment must proceed by particular averments (or, as they are technically termed, by *assignments of perjury*), to negative that which is false. It may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, though some of the circumstances had a real existence: but the word 'falsely' does not import that the whole is false; and when the proper averments come to be made, it is not necessary to negative the whole, but only such parts as the prosecutor can falsify, admitting the truth of the rest. (g) It is suggested that in negating the defendant's oath where he has sworn only to his *belief*, (r) it will be proper to aver that '*he well knew*' the contrary of what he swore. (s) It seems that an assignment of perjury may, in some instances, be more full than the statement of the defendant, which it is intended to contradict. Thus, where the fact in the affidavit, in which the defendant was charged to have perjured himself, was, that he never did, at any time during his transactions with the commissioners of the victualling-office, charge more than the usual sum of sixpence per quarter beyond the price he actually paid for any malt or grain purchased by him for the said commissioners as their corn-factor; and the assignment in the indictment, to falsify this, alleged that the defendant did charge more than sixpence per quarter *for and in respect of* such malt and grain so purchased; it was objected that the words *in respect of* might include lighterage, freight, and many collateral and incidental expenses attending the corn and grain jointly with the charge for the corn or grain, and, that bearing such sense, the defendant was not guilty of perjury; but the objection was overruled. (t)

The indictment must expressly contradict the matter sworn to by the defendant.

Assignment fuller than the statement of the defendant.

An indictment alleged that it was material, on the hearing of an information before justices of the peace, to prove that cards were played in the bar of a public-house between the hours of six o'clock and eight o'clock on a certain evening, and that the prisoner falsely swore that he was in the bar of the said house from between the hours of six o'clock and seven o'clock until nine o'clock in the said evening, and that he did not play at any game at all, and that no cards or game of cards at all were or was during all the said last mentioned time or between the hours aforesaid played therein; whereas the prisoner did between the hours of six o'clock and eight o'clock in the said evening play at a certain game of cards. Rolfe, B., held that the indictment was bad. The prisoner might have played at five minutes past six, and yet not have played from between six and seven until nine; the words 'from between six and seven' might be any time short of seven, five minutes or five seconds to that hour. The indict-

Imperfect assignment of playing at cards between certain hours.

15 Vict. c. 100, s. 25, vol. 1, p. 36; but Byles, J., was clearly of opinion that it was matter of substance. It was also urged that sec. 20 of that Act (*ante*, p. 35), rendered the averment unnecessary; but Byles, J., was clearly of opinion that it did not, as it was not one of the things named in that section.

(g) *Rex v. Perrott*, 2 M. & S. 385, 390. And see *ante*, vol. 2, p. 585.

(r) *Ante*, p. 2.

(s) 2 Chit. Crim. L. 312.

(t) *Rex v. Atkinson*, Dom. Proc. 1785. Bac. Abr. tit. *Perjury* (C). See *Reg. v. Gardiner*, *ante*, p. 52.

ment could not be read as averring that the prisoner swore that he did not play at any time during that evening, but merely that he did not play at a particular period of that evening, namely, from some period before seven until nine. That might be perfectly true, and yet he might have played between six and seven, and so may have played, as is assigned in the indictment, between six and eight. (*u*)

A variance between a material date in the matter sworn and the date in the denial of that matter is fatal.

Where an indictment for perjury committed in an information before magistrates, alleged that the prisoner was sworn on an information taken on the 11th of March, 1844, and deposed that on 'the morning of Thursday last, the 7th day of March (he meaning the 7th day of March in the year 1804),' he met G. C.; whereas the prisoner did not on the morning of Thursday, the 7th day of March, 1844, meet G. C.; it was held that 1804 could not be rejected as surplusage, and that the indictment was bad. (*v*)

The averments negating the truth of the matter sworn ought to be distinct and precise.

The averments introduced to negative the matter sworn, ought to be so distinct and definite as to inform the defendant of the particular and precise charges which are intended to be proved against him. An indictment for perjury committed in the Insolvent Debtors' Court alleged, that the defendant swore in substance that his schedule contained a full, true, and perfect account of all debts owing to him at the time of presenting his petition; whereas the said schedule did not contain a full, true, and perfect account of all debts owing to him at that time; and Lord Tenterden, C. J., after consulting the other judges of the Court of King's Bench, held that the indictment was insufficient, as it was quite impossible that the defendant could know, from allegations so vague and indistinct, what was to be proved against him; the allegations conveyed no information whatever of the particular charges, against which the defendant ought to be prepared to defend himself (*w*)

The indictment charged the prisoner with the offence of making a false declaration before a justice, that he had lost a pawnbroker's ticket, 'whereas in truth and in fact he had not lost the said ticket, but had sold, lent, or deposited it, as a security to one S. C., &c.' Held, that the allegations 'but had sold, lent, or deposited it, &c.,' did not render the indictment ambiguous or uncertain, but was pure surplusage, which might be rejected, and need not be proved. (*x*)

Perjury cannot be assigned on contradictory depositions without showing which of them is false.

It has been decided that perjury cannot be legally charged and assigned by showing that the defendant did on two different occasions make certain depositions contradictory to each other with an averment that each of them was made knowingly and deliberately, but without averring or showing in which of the two depositions the falsehood consisted. The information stated that the defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and

(*u*) Reg. v. Whitehouse, 3 Cox, C. C. 86.

(*v*) Reg. v. Garvey, 1 Cox, C. C. 111. Brady, C. B. This case is very badly reported, and it is very doubtful whether the wrong year was not given as the date of swearing the information.

(*w*) Rex v. Hepper, R. & M. N. P. R. 210. See Rex v. Mudie, 1 M. & Rob. 128, *post*, p. 79. R. v. London, 12 Cox, C. C. 50.

(*x*) R. v. Parker, 39 L. J. M. C. 60. L. R. 1 C. C. R. 225.

consent, did say, swear, and give in evidence, &c.; setting out the evidence so given. And then the count averred that the said defendant, at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c.: setting out in like manner the latter evidence, which was directly contrary to that given before the House of Commons; and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions), and so the jurors aforesaid do say that the said Edward Harris did commit wilful and corrupt perjury. And this was holden to be bad on motion in arrest of judgment. (y)

If there be any doubt on the words of the oath, which can be made more clear and precise by a reference to some former matter, it may be supplied by an *innuendo*; the use of which is, by reference to preceding matter, to explain and fix its meaning more precisely. (z) We have seen that, in a case of perjury committed in an affidavit, it was holden that a word which had been omitted by accident in the original document was improperly stated in the indictment, as though it had been in the original document, and that such word ought to have been inserted and explained by an *innuendo*. (a) In a case where an objection was taken to an indictment, that it added, by way of *innuendo* to the defendant's oath, 'his house situate in the Haymarket in St. Martin in the Fields,' without stating by any averment, recital, or introductory matter, that he had a house in the Haymarket, or (even admitting him to have such a house) that *his oath was of and concerning the said house*, so situated, the objection was overruled, on the ground that the *innuendo* was only a more particular description of the same house which had been previously mentioned. (b) And, in the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an *innuendo* that it was the outer door was holden good. (c) Where an *innuendo* is improperly introduced, and any use is made of it in the indictment, it cannot be rejected as surplusage, and it will be bad after verdict. (d) But if the *innuendo*, and the matter introduced by it, are altogether impertinent and immaterial, and can have no effect in enlarging the sense, it seems that they may be rejected as superfluous. (e)

Of the  
*innuendo*.

Where it may  
be rejected.

The proper office of an *innuendo* is to fix and point the meaning of something that has been previously averred. The indictment stated the presenting of a petition to the House of Commons concerning the election of F. H. F. Berkeley, and set out the petition, which stated the said F. H. F. Berkeley before and at the election was guilty of bribery, and that certain agents of the said F. H. F. Berkeley, being trustees of divers public charities, and by virtue of such office entitled to dispose of the funds of such

Virrier's case.  
An *innuendo*  
held good, as  
it fixed the  
meaning of  
what was pre-  
viously stated.

(y) *Rex v. Harris*, 5 B. & A. 926. It should have been averred and shown in which of the two depositions the falsehood consisted.

(z) *Rex v. Aylett*, 1 T. R. 70. *Rex v. Taylor*, 1 Campb. 404. See *Rex v. Grieve*, 1 Lord Raym. 256. 2 Salk. 513. And see as to the use of an *innuendo*, 1 Saund. 243, note (4). 1 Chit. on Plead.

406. 1 Stark. Crim. Plead. 118, *et seq.*

(a) *Rex v. Taylor*, 1 Campb. 404. *Ante*, p. 39.

(b) *Rex v. Aylett*, 1 T. R. 70.

(c) *Id. ibid.*

(d) *Rex v. Grieve*, 1 Ld. Raym. 260.

(e) *Roberts v. Camden*, 9 East, 93. 2 Chit. on Crim. 1, 511.

Indictment held sufficient to show that the occasion, to which the matter sworn related, was the one to which the allegation of materiality referred.

charities, before and at the said election were guilty of various corrupt acts, &c., in order to procure the return of the said F. H. F. Berkeley. The indictment then averred that one T. Carlisle was a trustee of divers of the said public charities, and 'that shortly before the said election (to wit), on, &c., the said T. Carlisle, the said F. H. F. Berkeley, and other persons, went to the house of one W. Virrier for the purpose of soliciting the said W. Virrier to vote for the said F. H. F. Berkeley at the said election.' The indictment then stated that certain members of the House of Commons were chosen to try and determine the merits of the said election, and that the said persons so chosen met to try and determine the matter of the said petition. The indictment then averred that S. Virrier appeared 'as a witness before the said select committee touching the matter of the said petition,' and that the said S. Virrier was duly sworn, &c. 'And it then and there became and was a material question, whether at the time aforesaid, when the said T. Carlisle, the said F. H. F. Berkeley, and the said other persons, so went to the house of the said W. Virrier, the said T. Carlisle said that he would give the said W. Virrier 6*l.* out of the funds of one of the aforesaid charities at Christmas, whereof the said T. Carlisle was trustee as aforesaid, or that he would give him 6*l.* at Christmas.' (f) And that the said S. Virrier falsely, &c., did depose, &c., to the select committee aforesaid, 'touching the matters and merits of the said election, and the matter of the said petition, in substance and to the effect following, viz., that *before the said election* a canvassing party came to her husband's house, and Mr. Berkeley (meaning the said F. H. F. B.), and Mr. Carlisle (meaning the said T. C.), came into the house of the said W. Virrier, and Mr. Carlisle asked her if she knew who her husband was going to vote for at the ensuing election; that she said she believed he was going to vote one and one, and that Mr. Carlisle then said that he would act like a sensible man, and 'I will give him the 6*l.* at Christmas' (thereby meaning that at the said time when the said F. H. F. Berkeley, and the said T. Carlisle, and the said other persons so went as aforesaid to the house of the said W. Virrier, for the purpose of soliciting him to vote for the said F. H. F. Berkeley, the said T. Carlisle said he would give the said W. Virrier 6*l.* at Christmas, out of the funds of one of the aforesaid public charities, whereof the said T. Carlisle was trustee as aforesaid).' (g) 'Whereas in truth and in fact the said T. Carlisle did not at the said time when the said F. H. F. Berkeley, the said T. Carlisle, and other persons went to the said house of the said W. Virrier to solicit him to vote as aforesaid, or during the time when, on that occasion, they were in or at the said house, say to the said S. Virrier that the said T. Carlisle would give to the said W. Virrier the 6*l.* at Christmas, or any sum of money from or out of any of the said public charities, or any sum of money whatsoever at Christmas or at any other time.' (h) The defendant

(f) The indictment here stated other questions to be material in a similar manner.

(g) The indictment here set out more of the evidence.

p. 74.

(h) The indictment here set out other assignments of perjury to the other parts of the evidence, which was set out in the indictment.

having been found guilty, it was moved, in arrest of judgment, that it did not appear either from the evidence said to have been given by the defendant, or from any other part of the indictment, except the innuendo, that the occasion on which the speaking of the words was said to have been material, was the same occasion with reference to which the evidence was given; that the averment of materiality might relate to one occasion, and the evidence to another occasion of the same kind; and that the innuendo would not aid, because an innuendo can only explain, and cannot supply the place of a substantial averment. The indictment also alleged that the defendant swore 'touching the matters and merits of the said election, and the matter of the said petition,' but that did not show that her evidence related to the material time before mentioned. Nor did her evidence, as set out, identify the occasion without the innuendo. The innuendo, therefore, did more than explain; it supplied that which made the evidence material. Lord Denman, C. J., after full argument and time taken to consider, delivered the judgment of the Court as follows:—'Upon this indictment a motion has been made to arrest the judgment upon two objections. 1st, that the allegation of the oath having been taken "touching the matter of the said election, and the matter of the said petition," did not sufficiently point to the matter whereupon the defendant was alleged to have given evidence; and, secondly, that there was nothing to fix the alleged gift and promise of money to the said visit on the 6th of July. We think, however, that neither objection is sustainable. As to the first, it does sufficiently appear that a competent trial was had, that a material question arose as to the existence of certain facts, to which the defendant deposed, and was therein guilty of perjury. Now although it is certainly true that the averment stating the oath to have been "touching and concerning the matters and merits of the said election, and the matter of the said petition," does not directly refer to what are alleged to be the material questions which arose, yet, where it does sufficiently appear, both by averment and otherwise, that the oath was upon a material point, the allegation "touching and concerning," &c., is wholly superfluous and unnecessary, and the indictment would have been sufficient if it had omitted that part altogether, and had merely stated that the defendant deposed and swore "as follows," &c. The second objection is, that the evidence, upon which the perjury is alleged to have been committed, is not referred with sufficient distinctness to the said canvassing visit, and that the innuendo, by which it is attempted so to apply it, introduces new matter, and is therefore bad. We, however, think otherwise; for an introductory averment expressly states that there was, in fact, such canvassing visit, and the innuendo directly refers thereto. It is plain, therefore, that this case comes within the rule laid down by Lord C. J. De Grey, in *Rex v. Horne*, (i) which has always been recognized as the true one; and that the innuendo does only point and fix the meaning of something previously averred, which is the proper office of an innuendo, and that it does

Conclusion of  
the indict-  
ment.

in no respect enlarge it. We think, therefore, that there is no ground for arresting the judgment.' (*j*)

An indictment for perjury at common law need not conclude against the form of the statute. The defendant was indicted for perjury in giving false evidence before the revising barrister as to the occupation of a tenement in the borough of Bridgnorth, and the indictment did not conclude against the form of the statute. It was objected that as this was a crime created by the 2 Will. 4, c. 45, s. 52, the indictment ought so to have concluded. It was answered that the revising barrister held a court, which was made so by sec. 50 of the same Act. That any false swearing in a court was perjury at common law, and therefore the indictment was good. Lord Abinger, C. B., thought the only question was, whether the statute, by sec. 50, constituted a court; for if it did, the offence of false swearing in it was perjury at common law, and his opinion was that it did constitute a court, and therefore the indictment was sufficient. (*k*) And so it has been held that an indictment for perjury committed by a plaintiff as a witness in his own behalf in a suit in a county court need not conclude 'against the form of the statute.' (*l*)

The old formal  
conclusion was  
immaterial.

Where all the counts of an indictment for perjury concluded, 'and so the jurors aforesaid upon their oath aforesaid *did* say that the defendant on &c., at &c., before &c., did commit wilful and corrupt perjury,' it was objected, on error, that this conclusion was erroneous in using the words 'did say' instead of 'do say;' but the Court of Queen's Bench held that the whole averment might be struck out, as the perjury was sufficiently alleged by the preceding part of each count; and as 'perjury' was not a word of art, like 'murder,' the concluding part of the count was immaterial. (*m*)

The Court will,  
in general,  
oblige the de-  
fendant to  
plead or de-  
mur to a de-  
fective in-  
dictment.

Where an in-  
dictment for  
perjury is  
clearly bad,  
the judge will  
refuse to try  
it.

In general the Court will oblige the defendant to plead or demur to a defective indictment for perjury. (*n*) And they are very cautious in granting a certiorari to remove it. (*o*)

But where an indictment for perjury is clearly bad upon the face of it, a judge at *nisi prius* may refuse to try such indictment. An indictment for perjury charged that one A. B. had been convicted of certain offences, and that A. B. afterwards obtained a rule to show cause why a new trial should not be granted, and that the defendant, in order to prevent the said rule from being made absolute, made the affidavit whereon the perjury was assigned, but there was no averment that the matters falsely sworn were material, nor could it be collected from the indictment that they were so; and Garrow, B., having consulted Abbott, C. J., who concurred with him in opinion that the indictment was clearly bad, held that it was the duty of the judge not to proceed to try the case. (*p*) So where in an indictment for perjury the

(*j*) Reg. v. Virrier, 12 Ad. & E. 317.

(*k*) Reg. v. Thornhill, Salop Sum. Ass. 1838, reported on another point, 8 C. & P. 575. In Rex v. De Beauvoir, 7 C. & P. 17, the indictment seems not to have concluded 'against the form,' &c. See the note at the end of the case.

(*l*) Reg. v. Morgan, 6 Cox, C. C. 107. Martin, B. See vol. I. p. 35.

(*m*) Ryalls v. The Queen, 11 A. & E.

781; R. v. Hodgkiss, 39 L. J. M. C. 14; and see now the 14 & 15 Vict. c. 100, s. 24, vol. 1, p. 35.

(*n*) 2 Hawk. P. C. c. 25, s. 146; Rex v. Sonter, 2 Stark. R. 423; Reg. v. Burnby, 5 Q. B. 348.

(*o*) 2 Hawk. P. C. c. 27, s. 28.

(*p*) Rex v. Tremearne, R. & M. N. P. R. 147. In Rex v. Deacon, R. & M. N. P. R. 27, Abbott, C. J., refused to



allegations negating the matter sworn, were so vague and indistinct as to convey no information of the particular charges against the defendant; Abbott, C. J., after consulting the other judges of the Court of King's Bench, ordered the case to be struck out of the list. (g) So where an indictment for perjury at common law was found at the Quarter Sessions, and removed by certiorari into the Court of King's Bench, and sent down to be tried at *nisi prius*; Gaselee, J., refused to try it, as it was quite clear that the sessions had no jurisdiction over perjury at common law, and the indictment was, therefore, void. (r) But a judge will not allow counsel to argue at length at *nisi prius* the invalidity of an indictment, for the purpose of inducing the Court to refuse to try it, as that is not the time or place to discuss such disputed questions. (s)

As to amending an indictment at the trial when there is a variance between the statements in it and the evidence, see vol. 1, p. 52.

The defendant was indicted in Middlesex for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a *prout patet* by the affidavit filed in the Court of King's Bench, at Westminster, &c., and on this he was acquitted; after which he was indicted again in Middlesex, for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn in London; which was traversed by an averment that, in fact, the defendant was so sworn in Middlesex, and not in London: and the Court of King's Bench held that he was entitled to plead *autrefois acquit*, as the *jurat* was not conclusive as to the *place* of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and, therefore, the defendant had been once before put in jeopardy for the same offence. (t)

With respect to the trial of perjury it may be observed, that the courts of Quarter Sessions have no jurisdiction over the offence at common law, and though they had jurisdiction over it under the 5 Eliz. c. 9, yet that jurisdiction is taken away by the 5 & 6 Vict. c. 38, s. 1, which enacts, that 'neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons for (*inter alia*) perjury or subornation of perjury; 'or 'making or

Plea of *autrefois acquit*.

Trial. Jurisdiction of the quarter sessions.

5 & 6 Vict. c. 38, s. 1.

try an indictment for a forcible entry, which was bad for want of alleging that the entry was *manu forti*, although the counsel for the defendant insisted that the case should proceed in order that the defendants might have the benefit of an acquittal by a jury, as they intended to institute proceedings for a malicious prosecution.

(g) *Rex v. Hepper*, R. & M. N. P. R. 210.

(r) *Rex v. Haynes*, R. & M. N. P. R. 298. See *Reg. v. Rigby*, 8 C. & P. 770.

(s) *Rex v. Abraham*, 1 M. & Rob. 7,

*ante*, p. 64. In this case the defendant's counsel pointed out the objections in order to induce the Court to stop the trial, and Lord Tenterden, C. J., said that 'it might be convenient sometimes for counsel to suggest a point on which an indictment is clearly bad, to save the time of the Court.' In *Rex v. Hepper* and *Rex v. Tremearne* the objections to the indictment were pointed out by the Court. See *ante*, p. 70.

(t) *Rex v. Emden*, 9 East, 437. As to pleading *autrefois acquit*, see vol. 1,

suborning any other person to make a false oath, affirmation, or declaration punishable as perjury, or as a misdemeanor. (*u*)

Examination  
before a justice,  
&c.

By the 22 & 23 Vict. c. 17 (amended by 30 & 31 Vict. c. 35), no indictment for perjury or subornation of perjury can be found by any grand jury, unless the case has been taken before a justice, &c., as therein mentioned. (*v*)

Time of trial  
at the Central  
Criminal  
Court.

It may be observed that it is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil suit while that suit is in any way undetermined, except in cases in which the Court, where the suit is pending, postpones the decision of it in order that the criminal charge may first be disposed of. (*w*)

Refusal to  
hear a charge  
of perjury  
whilst a suit  
is pending.

Where two justices refused to hear a charge of perjury alleged to have been committed in a suit in the Ecclesiastical Court, on the ground that that suit was still pending, the Court of Queen's Bench refused to grant a mandamus to compel them to hear the charge, and the Court seem to have thought that the course the justices had taken was the most likely to answer the ends of justice. (*x*)

Summary proceeding.

Where a person made an affidavit in the Court of Common Pleas, and afterwards, being summoned to appear in Court, came there, and confessed it to be false, the Court recorded his confession, and ordered that he should be taken into custody, and put in the pillory. (*y*) In answer to the objections of the defendant's counsel to this proceeding, it was argued that it was fully justified under the 5 Eliz. c. 9, and that even if the Court could not punish the defendant by virtue of that statute, he might be punished at common law, on the ground that any Court might punish such a criminal for an offence committed in *facie curiæ*. (*z*)

Evidence.  
One witness  
not sufficient.  
One witness  
and corroborative  
evidence.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury; as in such case there would be only one oath against another. (*a*) But this rule must not be understood as establishing that *two witnesses* are necessary to disprove the fact sworn to by the defendant; for if any material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction. (*b*)

Where there is  
only one  
direct witness  
there must be  
strong evidence  
to confirm that wit-

Upon an indictment for perjury, Coleridge, J., is reported to have said, 'one witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, Lord Tenterden, C. J., was of opinion that two witnesses were *necessary* to a conviction.' (*c*) In a later case, where the evidence

(*u*) *Rex v. Bainton*, 2 Str. 1088. *Rex v. Westiness*, id. *ibid.* 1 Chit. Crim. L. 301. *Rex v. Haynes, R. & M. N. P. R.* 298, vol. 1, p. 51.

(*v*) See the Acts, vol. 1, p. 2.

(*w*) *Rex v. Ashburn*, and *Rex v. Simmons*, 8 C. & P. 50.

(*x*) *Reg. v. Ingham*, 14 Q. B. 396.

(*y*) *Rex v. Thorogood*, 8 Mod. 179.

(*z*) *Id. ibid.*; and *Bushell's case*, Vaugh. 152, was cited.

(*a*) *Reg. v. Muscot*, 10 Mod. 193. 4 Black. Com. 358. Peake on Evid. 10. 1 Phil. on Evid. 151, 7th edit.

(*b*) *Rex v. Lee*, Mich. 6 Geo. 3 MS

*Bayley, J.*, 1 Phil. Evid. 152, 7th edit.; *R. v. Shaw, L. & C.* 579; 34 L. J. M. C. 169.

(*c*) *Champney's case*, 2 Lew. 258, and the same point is said to have been ruled by the same learned judge in *Rex v. Wigley*, *ibid.* note. And Mr. Starkie observes, 'And *semble* that the contradiction must be given by *two direct witnesses*, and that the negative supported by one witness, and by circumstantial evidence, would not be sufficient. It has been so held (*ut audiret*) by Lord Tenterden, C. J.' 3 Stark. Evid. 860, note (*g*).

of one witness went in support of all the assignments of perjury, and to confirm him another witness was examined as to a conversation between himself and the defendant, and some entries in the defendant's books were given in evidence; it was submitted that there was no evidence to go to the jury; that the rule is that a case of perjury cannot be submitted to the jury on the evidence of a single witness; and as to the evidence of confirmation, it was not enough that there should be *some* evidence in confirmation, as in an ordinary case at *nisi prius*, where some evidence is necessary to prevent a nonsuit; but it must be such evidence as, in the opinion of the judge, is really confirmatory in some important respect, and equivalent to the positive testimony of a second witness. Coleridge, J., 'I think that the case must go to the jury, but I also think without the slightest chance of a verdict for the crown. The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction.' (d)

ness in order  
to warrant a  
conviction.

An indictment for perjury committed on the trial of a civil bill alleged that the prisoner, Thomas Towey, falsely swore that 'the note produced is not my handwriting, or any part of it, and the name "Thomas Towey" as a witness is not in my handwriting.' The note purported to bear the marks of Patrick and James Towey as makers of the note, and had on it, 'Witness present, Thomas Towey.' The payee of the note could not read, but he identified the note, and swore that he saw Thomas Towey write on the paper, and saw Patrick and James put their marks on it. Another witness proved that he had subpoenaed Thomas Towey to appear at the sessions as a witness, and that the prisoner then said that there was no occasion to test him; that he would go to prove the note; and that at a meeting between the parties to try to settle the civil bill, on the payee of the note saying he had James Towey's note, and would take the law on it unless he signed a new one, Thomas said that he had been tested (subpoenaed) to come there, but that there was no occasion to test him; that he would prove the note. But the note was not produced at this meeting; and, upon a case reserved, it was held that this evidence was a sufficient corroboration of the evidence of the payee. The prisoner was the only witness to the note, and he could only prove it in his character as a witness, and, therefore, when he said he could prove it, it came to sufficient evidence that he was the witness to the note. (e)

Corroboration  
as to making a  
note.

An indictment for perjury alleged that in the month of June, 1851, the prosecutor had distrained upon the prisoner for certain arrears of rent, and that the prisoner on a trial at *nisi prius* falsely swore that there was only one quarter's rent due at the time of the said distress. On the trial for perjury the prosecutor positively swore to the fact of there being five quarters' rent due at the time

A statement  
by a prisoner  
that he owed  
certain rent is  
no corrobora-  
tion of the  
evidence of a  
witness that a

(d) Reg. v. Yates, C. & M. 132. See Reg. v. Parker, *post*, p. 80.

(e) Reg. v. Towey, 8 Cox, C. C. 328. The payee was cross-examined to show that there was another paper written by

the prisoner, which the payee could not distinguish from the note; but Hayes, J., observed that the jury had found that the prisoner spoke of 'the note.'

larger amount of rent was due a year after that statement was made.

of the said distress ; and produced his books by which he refreshed his memory ; and for the purpose of corroborating his statement and showing by the oaths of two witnesses the falsity of the matter sworn to, the son of the prosecutor deposed to a conversation with the prisoner in *August*, 1850, in which the prisoner admitted that three or four quarters of the said rent were then due. The jury convicted ; but, upon a case reserved, the judges were unanimously of opinion that this was not sufficient corroboration. There was nothing in the evidence of the son relevant to the issue. There was a year's interval between the transaction he spoke of and the time when the distress was made, and the money might have been paid intermediately. The oath of the son was quite as consistent with the oath of the prisoner as with that of the prosecutor. In perjury there must be something to make the one believed rather than the other, and there was no such evidence in this case. (*f*)

Virrier's case. Confirmation on two out of three assignments of perjury.

In one case where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the witness who spoke to such assignment on the facts contained in the other assignments. The indictment stated that the defendant swore that Mr. B. and Mr. C. came to her husband's house, that Mr. C. said, 'I will give him the 6*l.* at Christmas,' and Mr. B. shook hands with her, and put something into her hand, and told her to give it to her husband, and that it was a sovereign wrapped up in some paper ; and Mr. C. told her he should not forget it was in his power to give her husband the 6*l.* at Christmas. The assignments of perjury were, 1st, that Mr. C. did not say that he would give the 6*l.* at Christmas ; 2ndly, that Mr. B. did not put a sovereign into the hand of the defendant ; and, 3rdly, that Mr. C. did not tell the defendant that he should not forget it was in his power to give her husband the 6*l.* at Christmas. Evidence was given in support of all the assignments of perjury. Lord Denman, C. J., in summing up, said, that as to the second assignment the proof lay almost entirely in the evidence of one witness, and, therefore, he did not see how the jury could convict of the perjury imputed ; but that on the others there was a distinct contradiction of the defendant's testimony by Mr. C., who was supposed to have offered the 6*l.*, and several other witnesses ; and he left it to the jury to say whether there was not a strong body of evidence clearly supporting Mr. C.'s denial. (*g*)

(*f*) *Reg. v. Boulter*, 2 Den. C. C. 396. In Best's Pr. Ev. 440 it is observed, 'We apprehend that the old rule and reason of the matter are not satisfied unless the evidence of each witness has an existence and probative force of its own, independent of the other ; so that, supposing the charge to be one of those in which the law allows condemnation on the oath of a single witness, the evidence of either would form a case proper to be left to a jury, or would at least raise a strong suspicion of the guilt of the defendant.' See *R. v. Shaw*, 34 L. J. M. C. 168.

(*g*) *Reg. v. Virrier*, 12 Ad. & E. 317. The learned chief justice considered the most convenient mode of summing up the case to be to treat the second assignment as the first, and the first and third as one, and did so leave the case to the jury, who found a verdict of 'not guilty on the first assignment or perjury for want of sufficient evidence, and guilty on the second,' but said nothing on the third, and the verdict was entered accordingly. The chief justice did not at the time make any note of his summing up, but did so afterwards ; and having a distinct

But where upon an indictment for perjury, alleged to have been committed in making a charge of an unnatural offence, in which the defendant had deposed that he saw the prosecutor committing the offence, and saw the flap of his trowsers unbuttoned, and that he was there five minutes; and to disprove this the prosecutor swore that he did not commit the offence, and that his trowsers had no flap on; and to confirm him his brother proved that at the time in question the prosecutor was only absent three minutes, and that the trowsers he had on, which were produced in court, had no flap; Patteson, J., held that the corroborative evidence was quite sufficient to go to the jury; and, upon a case reserved, the judges held the conviction right. (*h*) So where perjury was alleged to have been committed by the defendant, who was an attorney, in an affidavit made by him to oppose a motion to refer the defendant's bill of costs to taxation, and to prove the perjury one witness was called, and in lieu of a second witness, it was proposed to put in the defendant's bill of costs delivered by him to the prosecutor; it was suggested that this was not sufficient, as the bill had not been delivered by the defendant on oath. Lord Denman, C. J., 'I have quite made up my mind that the bill delivered by the defendant is sufficient evidence, or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness.' (*i*)

Gardiner's case.

One witness and a bill of costs of defendant.

Where a prisoner was indicted for falsely swearing that he had paid J. Bland a certain sum of money on a particular occasion, and Bland swore that he received the money in packages, and afterwards counted it, and found it 7*l.* short; and the only corroboration of his statement was by another person, who also counted it, but had not been present when the money was received; it was held that this was no corroboration at all. (*j*)

Insufficient corroboration as to the payment of money.

An indictment alleged that the prisoner falsely swore at a petty sessions that D. Rees was the father of her illegitimate child. A witness other than D. Rees proved that the prisoner had said that D. Rees 'had never touched her clothes' at a time when she generally denied being in the family way; and Martin, B., thought that though, under some circumstances, such a statement might have been a sufficient corroboration of the evidence of D. Rees, yet this negation was so far a part of the general denial that the jury could not safely convict upon it alone. (*k*)

A statement by a mother of a bastard child.

A count alleged that the prisoner falsely swore that she had shown to one Cuthbert certain invoices bearing certain dates. Cuthbert swore that the prisoner had not shown him the invoices

A witness corroborated by his own memorandum.

remembrance of it, and no doubt of the jury's intention, he (on summons) allowed the *postea* to be amended by entering a verdict of 'guilty' on the first and third assignments, and 'not guilty' on the second; but the Court afterwards held that the amendment ought not to have been made, there being no note or memorandum of the judge or other document to amend by.

(*h*) Reg. v. Gardiner, 2 Moo. C. C. R.

95. See a fuller statement of this case ante, p. 52, *et seq.*

(*i*) Rex v. Mayhew, 6 C. & P. 315.

(*j*) Reg. v. Braithwaite, 1 F. & F. 638, 8 Cox, C. C. 444. Watson, B., and Hill, J. In the latter report it is stated that 'the prosecutor took it without counting it, and carried it to a Mrs. Watson's, and counted it over.' In the former 'The prosecutor took it without counting it, and carried it to an adjacent lane, where he counted a part of it, and found it wrong; he then gave it to a Mrs. Watson, and asked her to count it over.' the witness called to corroborate Bland.

(*k*) Reg. v. Owen, 6 Cox, C. C. 105.

she had sworn to ; but that she had shown others, and he produced a memorandum, he had made privately at the time, of the dates of the invoices, which showed that they were not the same as those sworn to by the prisoner ; Cockburn, C. J., held the private memorandum a sufficient corroboration. (*l*)

Knill's case.  
Contradictory  
oath of the  
defendant.

In a case where the defendant had been convicted of perjury, charged in the indictment to have been committed in an examination before the House of Lords, and the only evidence was a contradictory examination of the defendant before a committee of the House of Commons, application was made for a new trial, on the ground that in perjury two witnesses were necessary, whereas in that case only one witness had been adduced to prove the *corpus delicti*, namely, the witness who deposed to the contradictory evidence given by the defendant before the committee of the House of Commons ; and, further, it was insisted, that mere proof of a contradictory statement by the defendant on another occasion was not sufficient, without other circumstances, showing a corrupt motive, and negating the probability of any mistake. But the Court held that the evidence was sufficient, *the contradiction being by the party himself*, and that the jury might infer the motive from the circumstances ; and the rule was refused. (*m*) And the same principle appears to have been acted upon in a former case. The defendant had first made his information upon oath before a justice of the peace, that three women were concerned in a riot at his mill (which was dismantled by a mob on account of the price of corn), and afterwards, at the sessions, when the rioters were indicted, he was examined concerning those women, and (having been tampered with in their favour) he then swore they were not in the riot. There was no other evidence on the trial of the defendant for this perjury, to prove that the women were in the riot (which was the perjury assigned), but the defendant's own original information on oath, which was produced and read, and by which he had sworn that they were in the riot. And the judge thought this evidence sufficient, and the defendant was convicted and transported. (*n*) And with respect to this evidence, it has been observed, that when the same person has by opposite oaths asserted and denied the same fact, the one seems sufficient to disprove the other ; and with respect to the defendant (who cannot contradict what he himself has sworn) is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichever is given in evidence to disprove the other, it can hardly be in the

(*l*) Reg. v. Webster, 1 F. & F. 515. If this case is correctly reported, it deserves reconsideration. The memorandum was not itself admissible, and could only be used to refresh the memory of the witness ; so that the whole statement rested on his single oath ; and, even if the memorandum had been admissible, it would only have been the written statement of the witness and not on oath ; and the time when it was made and the veracity of its statements must have rested on his single oath. See Reg. v. Lara, *ante*, vol. 2, p. 521, in support of this reasoning. In Reg. v. Boulter, *supra*, 74 it was not

even suggested that the prosecutor's books could be used to corroborate his evidence.

(*m*) Reg. v. Knill, 5 B. & A. 929, note (*a*). In Reg. v. Hook, *infra*, p. 79, Pollock, C. B., doubted whether any conviction would now be permitted in such a case as Reg. v. Knill.

(*n*) Anon. cor. Yates, J., Lancaster Sum. Ass. 1764. And afterwards, Lord Mansfield, C. J., and Wilmot, J., and Aston, J., to whom Yates, J., stated the reasons of his judgment, concurred in his opinion. Notes to Reg. v. Harris, 5 B. & A. 939, MS. Bayley, J.

defendant's mouth to deny the truth of that evidence, as it came from himself. (o)

But where the defendant was indicted for perjury, alleged to have been committed on the trial of an indictment for larceny, and it appeared that the defendant had sworn to several material facts before the committing magistrate, but when he was called on the trial, denied the whole of what he had stated before the magistrate; and *Rex v. Knill* and *Anon.* (p) were cited to show that the contradiction by the oath before the magistrate would alone be sufficient evidence to convict the defendant; but Gurney, B., held, that it was not sufficient to prove that the defendant had, on two different occasions, given directly contradictory evidence, although he might have wilfully done so; but that the jury must be satisfied affirmatively that what he swore at the trial was false; and that would not be sufficiently shown to be false by the mere fact that the defendant had sworn the contrary at another time; it might be, that his evidence at the trial was true, and his deposition before the magistrate false. There must be such confirmatory evidence of the defendant's deposition before the magistrate, as proved that the evidence given by the defendant at the trial was false. (q)

Contradictory oath of the defendant not sufficient without other evidence.

So where a prisoner was indicted for perjury in evidence given

(o) From the Precedent-book of Chamber, J., cited 5 B. & A. *ibid.*

(p) *Supra*, notes (m) and (n).

(q) Reg. v. Wheatland, 8 C. & P. 238.

Although at first sight this decision may seem at variance with those cited, perhaps it may not in fact be so. In *Rex v. Knill*, the Court held that 'the jury might infer the motive from the circumstances,' none of which are stated in the short minute of the case; some of them might have been such as to show that the one statement was false, or the other statement true. In the Anonymous case the defendant had been *tampered* with after his first examination, and the evidence of the tampering with the defendant might be such as to lead to the conclusion that his evidence on the trial was false. But supposing those cases to go the length of establishing the proposition, that the defendant's own evidence upon oath is sufficient to contradict the evidence on which the perjury is assigned, it is conceived they cannot be supported. The prosecutor may charge the perjury either on the one statement or on the other, and whichever he selects it is clear that the defendant could not avail himself of a plea of *autrefois acquit*, or *convict* in case he were subsequently indicted for the other, and therefore he might be twice put in jeopardy, and perhaps twice convicted for the same offence. The judgment in *Rex v. Harris*, 5 B. & Ald. 926, is conclusive to show that this is a good objection. Again, such evidence leaves it wholly uncertain which of the two statements is true; now it is a clear rule of criminal law that if the evidence on the part of the prosecution leaves it

wholly uncertain whether the *crime charged* has been committed or not, the defendant must be acquitted; and as to the observation that 'it can hardly be in the defendant's mouth to deny the truth of the evidence that came from himself,' it must be remembered that there are two statements upon oath, and if he is to be concluded from denying one to be true, the same reason would conclude him from denying the other, and it would surely be very unreasonable to hold that he is concluded to deny the truth of whichever the prosecutor may think fit to select. It is conceived, also, that an indictment charging each of the statements to be false in separate counts could not succeed. The charges being directly contradictory the one to the other, it may be doubted whether the grand jury would be warranted in finding such an indictment; or, if found, whether it would not be bad on the face of it; and as the defendant could only make a defence to one charge by proving himself guilty of the other, the judge would probably insist upon the prosecutor electing on which charge he would proceed. But supposing these difficulties to be surmounted, it is not easy to see how it would be possible for the jury to find a verdict without any evidence to show which statement was false. If they found a general verdict they would at one and the same time find each of the statements to be both true and false, unless indeed they were satisfied that the defendant had, upon both occasions, wilfully sworn to matters about which he had no knowledge at all. *Ante* pp. 2, 66. C. & P. G.

before a grand jury, and her deposition on the hearing of the charge before the committing magistrate was put in to show that the statement before the grand jury was false; Tindal, C. J., held, that further evidence must be given; for if the two contradictory statements on oath alone were proved, *non constat* which was the true one. (r)

One statement may be true, the other innocently erroneous.

And where the prisoner was indicted for perjury, and it appeared that she had made two statements on oath, one of which was directly at variance with the other; Holroyd, J., is reported to have said, 'Although you may believe, that on one or other occasion she swore that which was not true, it is not a necessary consequence that she committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances, at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict where it is not possible to tell which was the true and which was the false.' (s)

Contradictory statements of the prisoner, but not on oath.

The prisoner, a policeman, laid an information against a publican for keeping open his house after lawful hours on the fast day, and on the hearing of the information swore that he knew nothing of the matter, except what he had been told by another person, and that '*he did not see any person leave the publican's house after eleven*' on the night in question. Perjury was assigned on this last allegation. It was proved by the clerk of the magistrates that the prisoner on laying the information said, he had caught the publican; he had last night seen four men leave his house after eleven; one of them he could swear to; it was Williamson; he knew him by his coat. Another witness proved that the prisoner, on another occasion, made the same statement to him. A third witness, Williamson, proved that, on a third occasion, the prisoner repeated the statement with the variation, 'One I can swear to; it was your brother.' It was proved that Williamson and others had left the house on that night after eleven. The prisoner on the hearing of the information acknowledged that he had offered to smash the case for 30s. He told another witness he should make the publican give him money to settle it; another witness heard him offer the publican to settle it for 1*l.*, saying he was risking perjury; and another witness proved that the prisoner owned he had received 10*s.* to smash the case, and was to have 10*s.* more. It was objected that there was no sufficient evidence, as these were only the statements of the prisoner not on oath against that on oath. But, on a case reserved, it was held that the conviction was right. In addition to the statements of the prisoner, there were strong confirmatory circumstances. The prisoner's offering to smash the case for one pound, his admitting that he

(r) Reg. v. Hughes, 1 C. & K. 519. The false statement before the grand jury was that certain table-cloths were the property of the prisoner's son, and she had sworn before the magistrates that they were her husband's, and the state of the family was given to prove

that the latter statement must be true; but Tindal, C. J., thought that there was so much doubt whether the prisoner might not have sworn under a misapprehension, that he directed an acquittal. Mary Jackson's case, 1 Lew. 270.



had received 10s. and was to receive 10s. more, and his talking of making the publican pay to settle it, are strong evidence to show that what he stated upon his oath was false, and that his statements not upon oath were true. (t)

In the following case, it was doubted whether the rule, which requires two witnesses, was satisfied by several witnesses, each supporting a separate assignment of perjury, but no two speaking to the same assignment. Upon the trial of an indictment for perjury, alleged to have been committed by an insolvent debtor in falsely swearing to the correctness of his schedule, the defendant's account-book, given by him to the Insolvent Debtors Court, was put in, and several persons, whose names were specified in the indictment as debtors, and omitted in the schedule, appeared in the book as debtors to the defendant, and 'paid' was marked to their accounts in the defendant's writing. These persons were called, and stated that they did not pay until after the petition and schedule. It was objected that this was not sufficient evidence, inasmuch as it was only oath against oath, the defendant having sworn that the debts were paid; a single witness, with respect to each particular debt, swore that it was not paid at the particular time of the schedule. Lord Tenterden, C. J., 'I feel the force of the objection. It is a very important point whether the defendant's book, and the oath on one side, be not met by the oath of the witnesses on the other side. It would be very difficult to give any other evidence. I will not stop the case. If the defendant is convicted, you can move for a new trial.' (u)

*Mudie's case.*  
Several witnesses speaking to several assignments of perjury.

But it has since been held, that the rule which requires two witnesses, or one witness and some sufficient corroboration, applies to every assignment of perjury in an indictment. Where, therefore, an indictment contains several assignments of perjury, it is not sufficient to disprove each of them by one witness; but in order to convict on any one assignment, there must be either two witnesses, or one witness and corroborative evidence, to negative the truth of the matter contained in such assignment. The prisoner was indicted for perjury, alleged to have been committed in an affidavit to obtain a criminal information, in which he had sworn that he had paid all his debts, except two, as to which

The rule applies to every separate assignment of perjury.

(t) *Reg. v. Hook, D. & B. 606.* Wightman, J., said, 'It is not necessary that there should be two independent witnesses to contradict the particular fact, if there be two pieces of evidence in direct contradiction. Here one piece of evidence is that the prisoner himself is proved to have made statements directly contrary to his statement on oath; that alone would not do; but in addition to that you have the oaths of other witnesses, which go to show that that which he stated when not upon oath was true; and therefore you have two pieces of evidence. I ought rather to put it that, instead of two witnesses being necessary to prove each fact, you must have the evidence of two persons giving evidence in contradiction to what has been sworn to by the prisoner; as, one witness who could prove, as in this case, that on other occa-

sions the prisoner had stated that which was diametrically opposed to that which he has sworn, and the other witness to give evidence of that which is directly opposite. You have therefore two contradictions: you have the contradiction of the prisoner himself, as deposed to on oath by one witness, and you have the contradiction of another independent witness, who speaks to the falsehood of the fact; you, therefore, have two independent contradictions on oath.' It is to be observed that, as it was proved that in fact the men did leave the public-house, as stated by the prisoner when he laid the information, the only question really was whether he saw them leave it.

(u) *Rex v. Mudie, 1 M. & Rob. 128.* The defendant was acquitted on another ground; see the same case, *post*, p. 102.

there was an explanation, and there were several assignments of perjury averring that he had not paid certain persons who were named (besides the two excepted ones), and such persons proved that they had not been paid, but only spoke to their respective debts not having been paid; Tindal, C. J., held that this was not sufficient, and that as to each debt there should be the testimony of two witnesses, or of one witness, and such confirmatory evidence as was equivalent to the testimony of a second witness. (*v*)

To what the rule requiring two witnesses extends.

The rule that the testimony of a single witness is insufficient to warrant a conviction on a charge of perjury, is an arbitrary rule, founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against the oath of another; (*w*) and it should be observed, that this rule does not extend to all the facts, which are necessary to be proved on the trial of an indictment for perjury; but only to the proof of the falsity of the matter upon which the perjury is assigned. Thus, the holding of the court, the proceedings in it, the administering the oath, and even the evidence given by the defendant, may all be proved by one witness. (*x*)

Although an assignment of perjury must be proved by two witnesses, it is not necessary to prove by two witnesses every fact which goes to make out the assignment of perjury.

The prisoner was indicted for having falsely sworn that one Prosser never was out of his sight between the hours of 7 A.M. and 10 A.M. on a certain day, and two witnesses proved that they saw Prosser at 8½ A.M. on that day near Lane's Fallow, but could not tell whether the prisoner was in sight of Prosser or not, as the fences were high. Another witness proved that at 9 A.M. the same morning he saw the prisoner alone and on foot at a place more than six miles from Lane's Fallow. It was objected that the assignment of perjury was not proved by two witnesses. Patteson, J., 'It is necessary to have two witnesses to prove an assignment of perjury; but there need not be two witnesses to prove every fact necessary to make out an assignment of perjury. If the false swearing be that two persons were together at a certain time, and the assignment of perjury that they were not together at that time, evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be a sufficient proof of the assignment of perjury.' (*y*)

An admission stands on the ground of a confession.

Where a statement made by a prisoner is in the nature of an admission that a previous statement on oath is false, it is to be dealt with as a confession, and not as falling within the cases which have just been noticed. (*z*)

A judge's notes are not admissible in

Where on an indictment for perjury committed, on a trial before a Queen's counsel at the assizes, his notes of the evidence,

(*v*) Reg. *v. Parker*, Stamford Sum. Ass. 1842. MSS. C. S. G. and C. & M. 639. Where an assignment of perjury was in the vague terms that defendant falsely swore that he had not treated a certain person to brandy, &c., on a certain day, instead of in the definite terms, that he had not treated him at a particular public-house, on a certain day, it was held, that proof of treating at two public-houses by two distinct witnesses, was sufficient to sup-

port a conviction, because any witness of a treating at a separate time and place on the same day, was sufficient corroboration of the witness who spoke only to one act of treating. *R. v. Hare*, 13 Cox, C. C. 174. Denman, J.

(*w*) 3 Stark. Evid. 859.

(*x*) See 2 Hawk. P. C. c. 46, s. 10.

(*y*) Reg. *v. Roberts*, 2 C. & K. 607.

(*z*) See Reg. *v. Hook*, D. & B. 606, per Byles, J.

proved to be in his handwriting, were tendered in evidence; Talfourd, J., held that they were inadmissible. (a)

The incompetency of witnesses on the ground of interest is removed by the 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83, and therefore the decisions on that subject are omitted. See these statutes, noticed *post*, *Evidence*.

Where a bill of indictment was preferred against the defendant for perjury, alleged to have been committed on a trial at the Quarter Sessions, and it was proposed to examine one of the grand jury, who had acted as chairman of the Quarter Sessions at the trial at which the alleged perjury was committed, but that gentleman expressed a desire not to be examined as a witness, and the grand jury wished to know whether they ought to examine him or not; Patteson, J., held that they ought not to examine him. He was the president of a Court of Record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court. (b)

In a case of perjury where the statements of the prisoner had not been taken down and were proved from memory, some observations being made as to the judge of the county court who had tried the case not being called to prove his notes, though he was willing to appear; Byles, J., said that the judges of the superior courts ought not, of course, to be called upon to produce their notes. If he were subpoenaed for such a purpose he should certainly refuse to appear. But the same objection was not applicable to the judges of inferior courts: he saw no reason why they should not be called, especially where, as in this case, the judge was willing to appear. (c)

It has been holden, that if a count in an indictment for perjury undertake to set out continuously the *substance and effect* of what the defendant swore when examined as a witness, it is necessary, in support of this count, to prove that *in substance and effect* he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury. It was urged in support of the prosecution that *reddendo singula singulis*, the defendant was charged with swearing separately in answer to all the questions that were mentioned. But Lord Ellenborough, C. J., said, 'Suppose you had undertaken to set out the *tenor* of what the defendant swore, and it should appear by the

evidence, but can only be used to refresh the memory.

Competency of witnesses.

Chairman at Quarter Sessions not allowed to be examined as a witness.

Judge of a county court.

Proof of the defendant having sworn *in substance and effect*.

(a) Reg. v. Child, 5 Cox, C. C. 197.

(b) Reg. v. Gazard, 8 C. & P. 595. In Rex v. Jones, 6 C. & P. 137, on an indictment for perjury the chairman of the Worcestershire Quarter Sessions proved what a witness swore on a trial before him at the Quarter Sessions. In Reg. v. Gazard, the chairman was required as a witness for the same purpose, and, not being examined, the bill was ignored. Mr. Starkie, after citing this case, adds a *quære*, without stating any reason for so doing. 3 Stark. Evid. 861. It may, however, have struck him that no sufficient reason could be assigned for the decision. It would, no doubt, be extremely inconvenient if the judges were called upon to give evidence as to what occurred before them in court, but the inconve-

nience in the case of chairmen of Quarter Sessions is comparatively slight, especially as they are usually present at the Assizes, and the evidence must be given in the county where they are chairmen. Assuming, however, that the inconveniences in their case were considerable, it seems worthy of further consideration how far that can prevent their liability to be called as witnesses. The general rule undoubtedly is, that every person is liable to be compelled to give evidence in a criminal case, and it may be dangerous to introduce exceptions which may prevent persons from giving evidence either for the crown or for the defendant. C. S. G.

(c) Reg. v. Harvey, 8 Cox, C. C. 99.

evidence that he had not sworn a material part of that which was set out, would not this have been fatal? Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words; but must you not prove that he swore in substance and effect the whole that you have stated? You aver that part of the defendant's evidence concerning the assurance given by Lord Headley to be material, and you have not proved that he swore to any such assurance. Did you ever know the rule *reddendo singula singulis* applied to a misrecital? Is there any authority to show that under *secundum substantiam* you are not bound to prove the *substance* of what you state, as under *secundum tenorem* you are bound to prove the *tenor*? To hold otherwise would be to introduce a most dangerous latitude into criminal proceedings. I am decidedly of opinion that you have failed in the proof of a substantial allegation. It is essential to the security of innocence, that words set out in the record should be either literally or substantially proved. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different. If a man swears falsely to several material questions, these may be included in distinct counts.' (d)

Proof of the whole of the defendant's testimony.

It appears to have been ruled, that upon an indictment for perjury committed at the trial of a cause, the prosecutor must prove *the whole* of the defendant's testimony, (e) unless the perjury be assigned upon a point which first arose upon the defendant's cross-examination, in which case proof of the whole cross-examination has been ruled to be sufficient. (f) And the ground

(d) *Rex v. Leefe*, 2 Campb. 134. The learned reporter says, 'I find no decision or dictum in the books as to the evidence of the words sworn which is necessary to support an indictment for perjury. For the general principles upon this subject, *vide* 2 Hawk. P. C. c. 46, ss. 34, 35, 36. *Compagnon v. Martin*, 2 Bl. Rep. 790.' The count upon which the question in this case turned, alleged that a committee was appointed and met to try the merits of a petition complaining of an undue election, that certain questions were material, and that the defendant swore 'touching the said material questions, and the merits of the said petition,' in substance and effect as follows,—that he, by the directions of J. L., waited upon Lord H. and proposed to the said Lord H. that the said J. L. would decline upon the expenses being paid him, including the previous expenses of the day before; that Lord H. agreed that the said expenses should be paid, including the expenses that had been incurred at different inns in the town; that J. L.'s voters were to be applied to in consequence of that arrangement for the purpose of voting for the said Lord H., and that the defendant enumerated the expenses; that the defendant upon his return to the committee of the said J. L. communicated to them what had so passed between the said Lord H. and him; and that the said committee dispensed to carry the

said agreement into effect; and that the said J. L. asked the defendant if the expenses were secured; and that the defendant told the said J. L. his lordship had given his assurance *that it should be so*. The assignments of perjury negatived each of these statements, and it was proved that every thing alleged was sworn, except the last words 'that it should be so.' The decision in this case seems questionable. As it is clearly settled that a defendant may be convicted of any one distinct assignment of perjury, though acquitted of all the rest; see *post*, p. 99, note (b); there seems no reason why proof of having sworn the matter negatived by one assignment should not be sufficient. In the case of obtaining goods by false pretences, it is clearly settled that proof of any one false pretence, and that the goods were obtained by that pretence, is sufficient, *ante*, vol. 2, p. 598; and that is a stronger case, because there the indictment in effect avers that all the pretences operated towards the obtaining the goods. In perjury each assignment of perjury is separate and distinct, and the court will give judgment upon one, although all the others are bad in point of law. *Reg. v. Rhodes*, 2 Lord Raym. 886. C. S. G.

(e) *Rex v. Jones, Peake*, N. P. C. 37, Lord Kenyon, C. J.

(f) *Rex v. Dowlin, Peake*, N. P. C. 179, Lord Kenyon, C. J.

upon which proof of the *whole* of the examination or cross-examination was ruled to be necessary in these cases appears to have been, that possibly the defendant might have corrected in some part of such examinations any mistake he had made in other parts. But it is observed, that this doctrine of compelling the prosecutor to prove more than a *prima facie* case is an anomaly in the criminal law; that in general the party indicting is not bound to anticipate matters of defence, which it lies on the prisoner to bring forward; and that it does not seem that, in this case, the party indicted would sustain hardship in being compelled to show that he had corrected the part of his evidence assigned. (g) And it is said by another learned writer, that at most the rule seems to amount to this, that all the evidence given by the defendant, in reference to the particular fact on which perjury is assigned, ought to be proved. (h) And the rule hardly seems to be necessary for the protection of the defendant, as it will be open to him to cross-examine the witness by whom his statements upon oath are proved, whether he did not in some other parts of his evidence correct or explain those statements upon which the prosecution is founded, and unless the witness can positively deny any such correction or explanation, or if he admits that they may have occurred, the proof will probably be deemed insufficient for a conviction. And it will of course be open to the defendant to prove that any corrections or explanations were given by him in other parts of his evidence. (i) And it has since been held, upon a case reserved, that on an indictment for perjury committed on the trial of a cause, it is sufficient to go to the jury, if a witness states from recollection the evidence that the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. (j)

Proof of all that was given on the particular point is sufficient.

Where a prisoner is indicted for perjury in evidence given on the trial of a cause, it is only necessary for the prosecution to prove so much of that evidence as is relevant to the matter in issue on the trial for perjury; but if the prosecution prove the whole of his evidence, and it refers to any deed or other document, which is so mixed up with it, that it is necessary to be read in order to make the evidence intelligible, the prisoner is entitled to have it put in

The prosecutor need only prove so much of the prisoner's evidence as is relevant to the matter in question on the trial for perjury.

(g) 2 Chit. Crim. L. 312, referring to 1 Sid. 418, *Rex v. Carr*.

(h) 3 Stark. Evid. 858. And the author further observes, that the rule even to this effect appears to be a doubtful one; for when it has once been proved that particular facts, positively and deliberately sworn to by the defendant in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn.

(i) *Rex v. Carr*, 1 Sid. 418.

(j) *Rex v. Rowley*, R. & M. C. C. R. 111, and R. & M. N. P. R. 229, where

Littledale, J., is reported to have said, 'I take the true rule to be this, that all the evidence referable to the fact on which the perjury is assigned must be proved.' In *Rex v. Munton*, 3 C. & P. 498, three witnesses stated what the defendant had said on the trial of an indictment for an assault, and the defendant was convicted, although none of the witnesses took down the evidence as it was given, and none of them professed to state the whole of the evidence given. And this course has been followed in subsequent cases. *Reg. v. Meek*, reported, 9 C. & P. 513, as to another point. *Reg. v. Ann Bird*, Gloucester Spr. Ass. 1842, Cresswell, J.

and read for that purpose; but he is not entitled to require it to be regularly proved by calling the attesting witness or the like. (k)

Proof of authority to administer the oath.

Acting as an officer sufficient.

It is sufficient to support the averment that the party administering the oath had competent authority for that purpose, to show in the first instance that he *acted* as a person having such authority. Thus, upon an indictment for perjury before a surrogate in the Ecclesiastical Court, it was ruled, that the fact of the person who administered the oath having acted as a surrogate was sufficient *prima facie* evidence of his having been duly appointed, and having authority to administer it. And Lord Ellenborough, C. J., said, "I think the fact of Dr. Parson having acted as surrogate is sufficient *prima facie* evidence that he was duly appointed and had competent authority to administer the oath. I cannot for this purpose make any distinction between the Ecclesiastical Courts and other jurisdictions. It is a general presumption of law, that a person acting in a public capacity is duly authorized so to do." (l) But it was holden, in the same case, that upon its appearing that the surrogate was appointed contrary to the canon (which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf), his appointment was a nullity, and the averment that he had authority to administer the oath was negatived. (m) So where perjury was assigned upon an affidavit sworn before Chell, a commissioner, &c., and it was proved that Chell acted as a special commissioner for taking the affidavits of parties in prison, or unable from sickness to attend before a judge; Patteson, J., held that this was sufficient evidence that Chell was a commissioner, and that it was not necessary to prove the commission under which the affidavit was taken, upon the general principle that a person acting as a public officer must be taken to have authority as such, and that a commissioner for taking affidavits came within that principle. (n) So where an affidavit was alleged to have been sworn before R. G. Whatley, a commissioner, 'then and there being duly authorized and empowered to take affidavits in the said county of G. in or concerning any cause depending in Her Majesty's Court of Exchequer,' and it was proved that Whatley had acted as a commissioner for taking affidavits in the Court of Exchequer for ten years; but had never seen his commission. He had, however, directed it to be applied for ten years before through his agent, and had been told by him that it had been granted; it was held that Whatley's acting as a commissioner was *prima facie* evidence that he was so. (o)

Acting as a judge of a county court.

Where in order to prove an allegation in an indictment for perjury that a county court was duly constituted under the 9 & 10 Vict. c. 95, a Gazette was put in, but it turned out to be a wrong one; Maule, J., held that proof that the judge acted in the capa-

(k) Reg. v. Smith, 1 F. & F. 98, Erle, J.

(l) Reg. v. Verelst, 3 Campb. 432. Reg. v. Cresswell, 2 Chit. Cr. L. 312. S. P. per Lord Ellenborough, C. J.

(m) Reg. v. Verelst, 4 Campb.

(n) Rex v. Howard, 1 M. & Rob. 187.

(o) Reg. v. Newton, 1 C. & K. 469. Atcherley, Serjt., after consulting Tindal, C. J. The defendant had requested Whatley to act as commissioner in taking this particular affidavit.

city of a judge of the court, in pursuance of and under the County Courts Act, would suffice. (p)

It has been held that an indictment for perjury in an affidavit sworn in the Insolvent Debtors Court by an insolvent, respecting the state of his property and expenditure, for the purpose of obtaining an extended time to petition under the 7 Geo. 4, c. 57, s. 10, cannot be supported, without proving that the court by its practice required such an affidavit: and it was also held that such proof was not given by an officer of the court producing printed rules, purporting to be rules of the court, which he had obtained from the clerk of the rules, and was in the habit of delivering out as the rules of the court, but which were not otherwise shown to be sanctioned by the court; the officer professing to have no knowledge of the practice except from such printed rules. (q)

Perjury in an affidavit in the insolvent court.

The taking the oath must be proved as it is alleged. Therefore, if it be averred that the defendant was sworn upon the Holy Gospels, &c., and it turned out that he was sworn in some other manner, according to some particular custom, and not upon the Gospels, the variance will be fatal. (s) But where the allegation in an indictment was, that on the trial of an action the prisoner 'was duly sworn, and took his corporal oath on the Holy Gospel of God,' and the proof was that the witness was sworn and examined; and it was objected that the particular mode of swearing must be proved, as the evidence given would apply to the oath of a Jew, or person of any other religion than the Christian; Littledale, J., held the evidence sufficient, as the ordinary mode of swearing was the one specified. (t)

The oath must be proved as alleged.

The recital of the place where the oath is administered in the jurat has always been considered as a sufficient proof that the oath was administered at the place named. (u) Where, therefore, perjury was assigned on an answer in chancery, and the defendant's signature to the answer, and that of the Master in Chancery to the jurat, were proved, and that Southampton Buildings, which the jurat recited as the place where the oath was administered, was in the county of Middlesex; Lord Tenterden, C. J., held that this was sufficient proof that the oath was administered in Middlesex. (v) So where on an indictment for perjury committed in an affidavit, the original affidavit was produced; and it was proved to be signed 'John Turner,' in the handwriting of the prisoner, and the jurat was 'Sworn in open court at Westminster Hall, the 10th day of June, 1846, By the court,' and it was proved that the words 'By the court' were in the handwriting of one of the masters of the court, by whom the jurats of affidavits are signed when the affidavits are sworn in court; it was objected that it should be shown that the master was in court when the prisoner was sworn before him. Erle, J., 'We have proof of the handwriting of the party sworn, and of the officer, who is authorized to administer the oath;

The place stated in the jurat is evidence that the defendant was sworn there, but not conclusive.

(p) Reg. v. Ward, 3 Cox, C. C. 279.

(q) Rex v. Koops, 6 Ad. & E. 198, 1 N. & P. 828. It was also contended for the defendant that the Insolvent Court had no power to make the rule, and that the offence was at any rate not perjury; but no opinion was expressed upon these points.

(s) 3 Stark. Evid. 857. Rex v. M'Arthur, Peake's case, 155.

(t) Rex v. Rowley, R. & M. N. P. R. 299.

(u) Per Lord Tenterden, C. J. Rex v. Spencer, R. & M. N. P. R. 97. 1 C. & P.

(v) Rex v. Spencer, *supra*.

and when an officer thus authorized writes under a proper jurat the words "By the court," I think that that is sufficient evidence that the affidavit was sworn before him, and properly sworn in court.' (*w*) But a variance as to the place of taking the oath will not be material, if it be proved to have been taken in the county where the defendant is indicted. (*x*) And upon an indictment in Middlesex, it may be shown that the oath was in fact taken in Middlesex, although the jurat state it to have been sworn in London. (*y*)

On a trial in Michaelmas term, 52 Geo. 3, of an indictment against a bankrupt for perjury before the commissioners in passing his last examination under the bankrupt laws then in force, Lord Ellenborough said, 'I am strongly inclined to think that you ought to give strict evidence of the bankruptcy. Unless the defendant really was a bankrupt, the examination was unauthorized. It goes to the authority of the commissioners to administer the oath. Their authority takes its root, not in the commission, but in the bankruptcy. While the commission subsists its validity may be assumed for certain civil purposes; but when a criminal case occurs, unless the party was a bankrupt all falls to the ground. However, I will save the point.' (*z*)

Upon an indictment for perjury against a witness examined as to a bankrupt's estate, a good petitioning creditor's debt must be shown.

The indictment stated that A. P. carried on the business of a builder, and that he was indebted to W. B. in the sum of 100*l.* and upwards; that he committed an act of bankruptcy; that a fiat issued against him, on the petition of W. B.; that the commissioners adjudicated A. P. to be a bankrupt; that in the prosecution of the fiat it became material to inquire into the estate and effects of A. P.; and that at a meeting of the commissioners the defendant appeared before them as a witness, and was sworn, &c. It appeared that the debt due to W. B. was much less than 100*l.*, but that there were two other creditors, to each of whom A. P. owed more than 100*l.*; therefore, under the 6 Geo. 4, c. 16 (the Bankrupt Act then in force), s. 18, the Lord Chancellor might, on application, have directed the substitution of a good petitioning creditor's debt for that of W. B., but that in fact this had not been done. It was objected that the defendant was entitled to be acquitted, as the averment that W. B. was a creditor to the amount of 100*l.* was not only not proved, but was disproved. The counsel for the crown cited *Rex v. Raphael*, (*a*) where Abbott, J., held, that on an indictment against a third person, examined before commissioners of bankrupt, their declaration that a party was a bankrupt is sufficient. The defendant having been convicted, the judges, upon a case reserved, held the conviction wrong. (*b*)

Proof of the defendant

On an indictment for perjury, in an answer in chancery, sworn

(*w*) *Reg. v. Turner*, 2 C. & K. 732.

(*x*) *Rex v. Taylor*, Skin. 403.

(*y*) *Rex v. Emden*, 2 East, 437. 3 Stark. Evid. 858.

(*z*) *R. v. Punshon*, 3 Campb. 96. See *R. v. Bullock*, 1 Taunt. 71; see the present Bankrupt Acts, vol. 2, pp. 440, 446.

(*a*) *Manning's Ind.* 232.

(*b*) *Reg. v. Ewington*, 2 M. C. C. R. 223. C. & M. 319. In the course of the argument before the judges, Lord Abinger, C. B., said, 'For cannot dis-

pute the authority of the commissioners to take the preliminary proceedings under the fiat, to ascertain whether the party should be adjudged bankrupt or not. They were authorized to do that by the fiat of the Lord Chancellor; but you say that if there was no good petitioning creditor's debt, the commissioners had no authority to inquire and examine witnesses as to the bankrupt's property.' See vol. 2, pp. 440, 446.



before the passing of the Judicature Acts, the bill must be proved in the usual way; the proof of the defendant's signature, and that of the master before whom the answer purports to be sworn, is evidence of the defendant's having sworn to the truth of the contents, without calling the person who wrote the jurat; or further, proving the identity of the defendant as being the very same person who had signed the answer. (c) But unless there be such proof of the defendant's signature, or some other sufficient proof to identify him as the person by whom the oath was taken, no return of commissioners, or of a master in chancery, will be sufficient. (d) In a case upon the 31 Geo. 2, c. 10, s. 24, (for taking a *false oath* to obtain administration to a seaman's effects, in order to receive his wages), it was holden necessary to prove, directly and positively, that it was the prisoner who took the oath. (e)

having taken the oath in an answer in chancery.

Proof upon obtaining administration of a seaman's effects.

An indictment for perjury alleged that the prisoner, 'being a trader within the meaning of the statutes in force relating to bankrupts, but owing debts amounting in the whole to less than 300*l.*, and having resided for six calendar months next immediately preceding the time of filing his petition within, &c.,' did present his petition to the Insolvent Court in Portugal Street; and the only evidence given in support of these allegations was the prisoner's petition filed in that court, which alleged the very same matters as facts upon the truth of which, with others, the prisoner rested his application to the insolvent court; and, on a case reserved, it was held that, as against the prisoner, the statements in the petition, uncontradicted by any conflicting testimony, were abundant evidence to prove those allegations in the indictment. (f)

The statements of facts in an insolvent's petition are evidence against him of those facts.

An indictment for perjury alleged that W. Turner made his will and appointed J. H. Turner, W. B. Wood, and W. T. Abud the executors thereof, and to prove this averment the probate of the will was tendered; it was objected that, as the will applied both to lands and personalty, the original will must be produced and proved. Erle, J., 'A will may in law have two operations—the one, as to realty, respecting which the ecclesiastical courts have no jurisdiction; the other, as to personalty and executors, in which the ecclesiastical courts have sole jurisdiction, and therefore, with respect to the latter, the evidence of the attesting witness is not necessary here. If all the matters in this indictment relate to personalty and executors, the probate is the proper proof; but if there is any question here raised as to whether the testator devised lands, the original will must be produced, and one of the attesting witnesses called. But if it is only to be shown that the deceased made a will, and left certain persons executors of it, I shall hold the production of the probate to be the proper proof.' (g)

Where the matters in an indictment for perjury relate to personalty only and the appointment of executors, the probate is the proper proof that the testator made a will.

On an indictment for perjury in a deposition sworn by the prisoner as a proof of a debt against a bankrupt, it appeared that the proof was placed according to the practice on a file of the proceed-

After proof of the loss of a deposition in bankruptcy,

(c) *Rex v. Benson*, 2 Campb. 508. *Rex v. Morris*, 2 Burr. 1189. 1 Leach, 50. The reason why the Court of Chancery made a general order that all defendants should sign their answers was with a view to the more easy proof of perjury in an-

swers. 2 Burr. 1189. See *Reg. v. Turner*, 2 C. & K. 732.

(d) *Id. ibid.*

(e) *Brady's case*, 1 Leach, 327.

(f) *Reg. v. Westley, Bell*, C. C. 193.

(g) *Reg. v. Turner*, 2 C. & K. 732.

secondary evidence is admissible.

ings, where it remained for several months, and the prisoner having demanded an inspection of the file, it was handed to him by the usher, and shortly afterwards returned to the usher, who restored it to the customary place of deposit without examination. It was afterwards discovered that the proof had disappeared, and all searches for it had proved ineffectual; and an office copy under the seal of the court was tendered in evidence. It was objected, on the authority of Taylor on evidence, (*h*) that a copy could not be received in evidence in a case of perjury; but Hill, J., held that, on proof that the original had been lost or destroyed, secondary evidence was admissible. (*i*)

Proof of materiality.

In order to show the materiality of the deposition or evidence of the defendant, it is essential, where perjury is assigned in an answer to a bill of equity, filed before the passing of the Judicature Act, to produce and prove the bill, (*j*) or if the assignment is on an affidavit, to produce and prove the previous proceedings, such as the rule *nisi* of the court, in answer to which the affidavit in question has been made. (*k*)

If the assignment be on evidence on the trial of a cause, in addition to the production of the record (*l*) the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn was material. So also such prefatory circumstances and innuendos as are averred upon the face of the indictment for the same purpose must be proved (*m*)

Evidence of a deceased witness.

It is reported to have been held upon the trial of an information for perjury, alleged to have been committed on the trial of an ejectment, that in order to prove the perjury a witness might prove what a witness, who was since dead, swore on the trial of the ejectment. (*n*) It has been observed that this ruling seems to be utterly inconsistent with the principles now established. (*o*)

Evidence that judgment had been entered up.

Some counts in an indictment for perjury committed in an affidavit to oppose a summons to set aside a judgment obtained by the prisoner alleged that the prisoner 'caused to be entered up final judgment in the said action;' and a clerk from the judgment office produced from that office a book in which judgments are entered up, and stated that interlocutory judgment was signed in the action, and that final judgment was afterwards entered up; it was objected that the roll or an examined copy of it ought to have been produced. It was answered that the 'entering up' of final judgment always takes place before there is any roll carried in, and is the making of the entry in the book produced; (*p*) and Lord Denman, C. J., held the proof sufficient. (*q*)

(*h*) S. 1379, p. 1232, third edit.

(*i*) Reg. v. Milnes, 2 F. & F. 10.

(*j*) 3 Stark. Evid. 859, citing Rex v. Allford, 1 Leach, 150.

(*k*) 3 Stark. Evid. 859.

(*l*) Rex v. Iles, Hard. 118. Bull. N. P. 243. 2 Hawk. P. C. c. 46, s. 57, 3 Stark. Evid. 855.

(*m*) 3 Stark. Evid. 859.

(*n*) Rex v. Buckworth, T. Raym. 170, per Twisden, J., and Morton, J., against Keeling, C. J., who said it was not to be allowed, because between other parties.

(*o*) 3 Stark. Evid. 861, where the case

is erroneously cited as Taylor v. Brown. The report does not show for what precise purpose the evidence was adduced; if for the purpose of proving what passed on the former trial in order to show that the matter was material, *qu.* whether it was not admissible. C. S. G.

(*p*) Fisher v. Dudding, 9 Dowl. P. C. 872.

(*q*) Reg. v. Gordon, C. & M. 410. The prisoner was convicted, and no motion made on the point, as there were other counts which did not allege the entering up of the judgment.

Where, in order to prove an allegation in an indictment for perjury that a cause came on to be tried, the *nisi prius* record was produced, and it appeared that no *postea* had been indorsed upon it, but there was a minute, in the handwriting of the officer, indorsed upon the jury panel which was affixed to it, in these words, 'Verdict for plaintiff, damages 1s.' Lord Tenterden, C. J., after consulting the other judges of the Court of King's Bench, held that the officer's minute was sufficient evidence that the trial took place. (*r*)

Officer's minute of a verdict at *nisi prius*.

Where an indictment for perjury alleged that certain issues came on to be tried and were tried before the sheriffs of London upon the execution of a writ of trial, and the *postea* being produced, the verdict appeared to have been taken on one of two issues, without any statement as to the event of the other, the Court of Queen's Bench held that the allegation was proved by the record and *postea* taken together. It appeared that the jury was summoned and sworn to try 'the issues:' and if on one of the issues the jury had been withdrawn, yet both would have come on for trial and have been tried. (*s*)

Evidence that issues came on to be tried.

An indictment alleged that a certain action came on to be tried in due form of law, and was duly tried by a jury of the county in that behalf duly sworn. The record stated that the jury were sworn, and after evidence given withdrew to consider their verdict, and after they had agreed returned to the bar to give their verdict, 'whereupon the plaintiff being called, comes not, &c.' It was objected that the trial was not complete, as the jury had not given any verdict. It was answered that, as far as the jury were concerned, the cause was by them duly tried. They were sworn to 'truly try and a true verdict give,' and they might try and yet not give a verdict; and the objection was overruled. (*t*)

An averment that an action was tried, held to be proved, though the plaintiff was nonsuited when the verdict was about to be given.

An indictment for perjury averred that there was an action pending between W. C. and B. and the defendant. The writ was not produced, but to show the existence of the action, the attorney for the plaintiffs in the action produced a notice of set-off entitled in the cause, which he had received from the attorneys for the defendant in the action; it was objected that the notice of set-off was inadmissible, as at most it was only secondary evidence; and the objection was held good. (*u*)

A notice of set-off is not evidence that an action was pending.

On a trial for perjury at the Central Criminal Court the caption of the same court of oyer and terminer or gaol delivery at which the indictment for perjury is preferred, the former indictment with the indorsement of the prisoner's plea, the verdict, and sentence of the court thereon, together with the minutes of the trial, made by the officer of the court, are sufficient evidence of the former trial, without a regular record or any certificate thereof. (*v*)

Proof of a trial at the Central Criminal Court.

An indictment alleged that there being a certain plaint lodged against the prisoner in a county court, the same came on to be

Evidence of a trial and appearance in a county court.

(*r*) *Rex v. Brown*, M. & M. 315. 3 C. & P. 572.

(*s*) *Reg. v. Schlesinger*, 10 Q. B. 670.

(*t*) *Reg. v. Bray*, 9 Cox, C. C. 218.

The Recorder, after consulting Bramwell, B., and Byles, J.

(*u*) *Rex v. Stoveld*, 6 C. & P. 489.

Lord Denman, C. J.

(*v*) *Reg. v. Newman*, 2 Den. C. C. 300. The trial for perjury was in December, 1851; the trial on which the perjury was committed was at a session held on the 12th of May, 1851, and the caption was dated on that day.

tried, and that the prisoner was duly sworn, &c. It was proved by the clerk of the court that such a plaint had been filed, (*w*) and it was proposed to give parol evidence of the proceedings on the trial; but it appearing that there was a minute book wherein were entered the plaints, the appearance of the parties and the result of the trial, it was objected that that book ought to be produced, in order to prove the plaint and the appearance of the prisoner. That the evidence of the prisoner could not be proved by parol if it was taken down in the book. And lastly, the summons must be proved in order to give the court jurisdiction. Maule, J., 'I think the want of the proof of the summons is answered by the fact of the prisoner's appearance, which may be proved by parol. That is sufficient to carry the case on; but, if it should be necessary, I will reserve the other points;' and the evidence was received. (*x*)

Where an indictment is preferred for perjury committed on the hearing of a plaint in the county court, the only proper course to prove the proceedings in that court is to produce the clerk's book or a copy having the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court under the 9 & 10 Vict. c. 95, s. 111. (*y*)

An indictment for perjury alleged that a certain suit was instituted in the Prerogative Court of Canterbury, in which M. S. Merryweather was plaintiff, and J. Turner, J. H. Turner, W. B. Wood, and W. T. Abud, defendants; and in order to prove this allegation, an officer from the registrar's office in the Prerogative Court produced from the office an original allegation put in on behalf of M. S. Merryweather, and the original allegation put in on behalf of the executors in answer to it, and proved the signatures of two advocates, who acted as advocates in the court, to each of the allegations; and Erle, J., held that this was sufficient proof of the suit having been instituted as alleged. (*z*)

An indictment alleged that the prisoner appeared at a petty sessions in pursuance of a summons requiring him to answer a complaint of A. Jones touching a bastard child of which she alleged him to be the father, and alleged that he committed perjury on the hearing of that complaint. The magistrate's clerk produced a book containing the minutes made by him on the occasion, headed 'Ann Jones v. Richard Newall, affiliation,' and then the evidence was set out. There was no other evidence of the proceedings before the justices. It was objected that the summons ought to have been produced, or notice to produce it served on the prisoner. Wightman, J., 'The 7 & 8 Vict. c. 101, provides that "upon complaint by the mother, the justices shall have power to summon the putative father, and upon the appearance of the person so summoned, or upon proof of the service of the summons, to hear and adjudicate upon the case." A summons is, therefore, necessary to give the magistrate jurisdiction; and to

(*w*) It is not stated how this was proved.

(*x*) Reg. v. Ward, 3 Cox, C. C. 279. It is not stated how the evidence given by the prisoner was proved. He was convicted.

(*y*) Reg. v. Rowland, 4 P. & F. 172.

Bramwell, B., who said he had ruled in the same way previously, and held that the proceedings on hearing the plaint could not be proved by the assistant clerk of the court.

(*z*) Reg. v. Turner, 5 C. & K. 732.

Proof of a suit in the Prerogative Court.

In a bastardy case the summons must be proved; it is not sufficient to prove the minutes of the proceedings before the justices.

prove that they had jurisdiction in this case you must prove that the prisoner was duly summoned, either by production of the summons, or by secondary evidence after notice to the prisoner to produce it. The minutes of examination in this case are no more than the minutes of a shorthand writer, and only answer the purpose of refreshing the memory of the witness. (a)

Upon an indictment for perjury committed at the hearing of an information in bastardy, laid under the 7 & 8 Vict. c. 101, which indictment alleged the application for a summons, the issuing thereof, and the hearing upon it, proof of the information, of the appearance of the defendant, of the hearing, of evidence being given on both sides, and of no objection being made of the want of a summons, is sufficient to shew jurisdiction in the justices who heard the information, without proof of the summons which issued upon that information; and a conviction for perjury upon the above indictment was upheld. (b)

Where, upon an indictment for perjury alleged to have been committed on the trial of an appeal against an order of removal, the sessions book was produced by the clerk of the peace in order to prove the trial of the appeal, and the clerk of the peace stated that he would, if applied to, have drawn up a record of the trial of the appeal on parchment; it was held that the sessions book was not sufficient evidence of the trial of the appeal. (c) But it has since been held that the sessions book containing the orders and other proceedings of the court made up and recorded after each session, with an entry containing the style and the date of the sessions, and the name of the justices in the usual form of a caption, no other record being kept, is good evidence of the trial of an appeal against an order of removal. (d)

Proof of the trial of an appeal.

Where perjury was assigned on the answer to a bill in chancery as it originally stood, which bill had afterwards been amended, and the bill was produced by a clerk from the six clerks' office, who stated that it was an amended bill, but that it was the original record which was filed in the six clerks' office in the first instance, but altered by the amendments, which were made by altering the original record, and that these alterations were all made by a clerk in the six clerks' office, whose handwriting he knew, and that that person wrote the word 'amendment' against each alteration; but none of the alterations related to the particular parts of the answer upon which the perjury was assigned. It was contended that this was not sufficient evidence of what the bill was before the alterations, and that the person who made the alterations ought to be called. But Lord Tenterden, C. J., was of opinion that the amendments were sufficiently proved, and also thought them not material to the case. (e)

Amended bill in chancery evidence of the original bill.

In one case, upon an indictment for perjury, a copy of a bill in chancery was rejected which contained many abbreviations, (f)

A copy of a bill in chancery containing

(a) *Reg. v. Newell*, 6 Cox, C. C. 21, A.D. 1852. Three duplicate orders had been made, but none of them was produced, or notice to produce any of them given. See the subsequent cases of *Reg. v. Berry*, *ante*, p. 17, and *Reg. v. Simmonds*, *ante*, p. 9; see *Reg. v. Whalley*, 8 Cox, C. C. 438; *Reg. v. Hurrell*, 3 F.

& F. 271. *R. v. Smith*, *infra*.

(b) *R. v. Smith*, 37 L. J. M. C. 6; see *R. v. Carr*, 10 Cox, C. C. 564.

(c) *Rex v. Ward*, 6 C. & P. 366, Park, J. A. J.

(d) *Reg. v. Yeoveley*, 8 A. & E. 806, Rex v. Daycock, 4 C. & P. 326.

(f) Such as 'possd of consible pml este.'

ing abbreviations is insufficient.

and had all the dates in figures, it being proved that in the original bill all the words were written at full length, and all the dates expressed by words. (*g*)

It seems that if a party produce an affidavit, purporting to have been made by him before commissioners in the country, and make use of it in a motion in the cause, it will be evidence against him that he made it. (*h*)

The fact of a defendant in a cause having been examined may be proved by parol.

Where, upon an indictment for perjury committed upon a trial, the supposed perjury arose upon evidence given in reply to the testimony of one of the defendants on the former trial, who was acquitted and examined as a witness, and the indictment for perjury did not state his acquittal, nor did the minute of the verdict produced show it; it was held, that although the evidence of a shorthand writer, who stated that the defendant was acquitted and then examined, was not any proof of his acquittal, yet it was good proof that he was examined. (*i*)

An affidavit of a marksman is inadmissible unless it is shown to have been read over to the deponent; *secus* if made by a party who can write.

If perjury is assigned upon an affidavit made by a marksman, either the jurat must state that the affidavit was read over to the defendant, or it must be proved that it was so read. Upon an indictment for perjury in an affidavit, which was signed with the mark of the defendant, but the jurat to which omitted to state that it was read over to the defendant; Littledale, J., said, 'as the defendant is illiterate, it must be shown that she understood the affidavit. In those cases where the affidavit is made by a person who can write, the supposition is that such person was acquainted with its contents, but in the case of a marksman it is not so. If in such case the master by the jurat authenticates the fact of its having been read over, we give him credit; but if he does not, and the fact were so, he ought to be called to prove it. I should have difficulty in allowing the evidence of any other person to that fact.' And no evidence being adduced to show that the affidavit was read over in the presence of the defendant, it was held that the assignments of perjury on this affidavit could not be supported. (*j*)

An affidavit referring to an inadmissible affidavit.

It was held in the same case, that where one affidavit, which has a perfect jurat, refers to another affidavit which is inadmissible for want of proof that it was read over to the defendant, the former affidavit cannot be read. (*k*)

Where the assignments of perjury allege that certain persons by name were debtors, evidence of others being so is inadmissible.

Where an indictment for perjury, alleged to have been committed in the Insolvent Debtors Court, stated that the defendant gave in his schedule on oath that the same and all its contents were true, and contained a full, true, and perfect account of all his just debts, credits, &c., and then went on to state that the said schedule and its contents were not true, and that certain persons whose names were set out were debtors to the defendant at the time of giving in his schedule; Lord Tenterden, C. J., held that the evidence must be confined to the cases specified in the indict-

(*g*) Reg. v. Christian, MSS. C. S. G. and C. & M. 388, Lord Denman, C. J.

(*h*) Rex v. James, Show. 397. 3 Stark. Evid. 857. And see Brickell v. Hulse, 7 A. & E. 454.

(*i*) Rex v. Browne, M. & M. 315. Lord Tenterden, C. J., after consulting the other judges of the Court of King's

Bench. See this case as to another point, ante, p. 89.

(*j*) Rex v. Hailey, R. & M. N. P. C. 94. 1 C. & P. 258.

(*k*) Rex v. Hailey, 1 C. & P. 258. The report does not state in what manner the one affidavit referred to the other.

ment, as the defendant could only come prepared to answer those cases, and that evidence that other persons, whose names were not set out in the indictment, were also debtors to the defendant and were omitted in the schedule, was inadmissible. (l)

An indictment for perjury alleged that the defendant made an affidavit, which stated that the creditors of the defendant were all, with two exceptions (which were explained) paid in full; whereas the said creditors were not all, with two exceptions only, paid in full; and whereas divers creditors of the defendant exceeding the number of two, naming several creditors, were not paid in full: and evidence being tendered of debts to other persons than those named being unpaid; it was objected that the first assignment was bad as too general, and that evidence as to debts due to others than those named ought not to be admitted. Tindal, C. J., 'You might have demurred to this assignment only, if it be too general, and as you have not done so, I do not see how I can exclude the evidence.' But 'I think that omitting the names in one assignment of perjury and inserting them in the next is likely to mislead the defendant; as he would be very likely to suppose that the debts, mentioned in general terms in one assignment, were those particularised in the other;' whereon the evidence was not pressed. (m)

Where there is a general assignment and also an assignment mentioning particular names.

Where an indictment for perjury alleged that Hallett exhibited a bill in chancery, by which he set forth that he, Bowden, and Tucker (the defendant), entered into a verbal agreement to become joint dealers and co-partners in the trade or business of druggists; and assigned perjury against the defendant in swearing that he, Hallett, and Bowden did not become joint dealers in the trade or business of druggists; and it appeared that Hallett was a druggist, but the defendant and Bowden were drug brokers, and had nothing to do with Hallett's shop, or the drugs sold there, but were continually in the drug market; but being brokers of the city of London they could not deal in their own names, and it was agreed that they should buy and sell drugs in Hallett's name, and then they were to divide the profit and loss. Abbott, C. J., held that the allegation in the bill in chancery could only apply to an ordinary partnership, and not to such a transaction as this, and consequently, that the indictment could not be supported. (n)

Averment of a partnership not supported by the facts.

Where an indictment for perjury alleged that a bill was pending in the Court of Chancery, and that it became material to ascertain whether an annuity granted by G. Hawkins to the defendant, or granted to J. B. Bostock, as trustee for the defendant, had been paid up to the year 1828, and that the defendant falsely swore that the annuity had not been paid up to 1828; and in order to show that Bostock, who was abroad, had paid the money to the defendant, it was proved that Bostock had sent money to his banker's by his clerk; it was held that what the clerk said about the money at the time he paid it into the banker's was admissible in

Declaration by an agent at the time of paying money into a bank.

(l) *Rex v. Mudie*, 1 M. & Rob. 128. the latter report.  
 S. C. as *Rex v. Moody*, 5 C. & P. 23. (m) *Reg. v. Parker*, C. & M. 639.  
 The indictment is set out in the note to (n) *Reg. v. Tucker*, 2 C. & P. 500.

Parol evidence  
to add to a  
deposition.

evidence, on the ground that it was a declaration made by an agent acting at the time within the scope of his authority. (o)

Upon an indictment for perjury alleged to have been committed upon the hearing of an information for sporting without a game certificate, in order to prove what the defendant swore before the magistrate, his deposition taken in writing before the magistrate was put in, and it was held that evidence was not admissible of other things stated by the defendant, when he was examined as a witness before the magistrate, but which were not contained in the written deposition. (p)

Insufficient  
examination  
of rules of a  
benefit society.  
Prefatory  
averments  
held to be  
surplusage.

An indictment alleged that the prisoner was a member of a benefit society, the rules of which were duly certified, and a transcript of them filed with the clerk of the peace, and that by a rule of the society it was provided that if any free member should have his property destroyed by fire, he should produce a certificate, and if the property was not insured the society would indemnify him to a certain amount if the claim were authenticated by a solemn declaration before a magistrate, and then charged the prisoner with making a false declaration before a magistrate contrary to the 5 & 6 Will. 4, c. 62, s. 18, that he had sustained a loss by fire. In order to prove the rules of the society a copy of the rules was produced, and the 24th rule, which was applicable to the allegations in the indictment, was proved to have been examined with the transcript at the clerk of the peace's office; but no other rule had been so examined; and Erskine, J., held that all the rules ought to have been compared. To prove the rules, either the original transcript should have been produced, or an examined copy of the whole of it. It was then objected that the indictment was not proved. But Erskine, J., held that all the statements in the indictment with reference to the society might be rejected as surplusage, if there was enough on the face of the indictment to show that an offence was committed without any reference to the society or its rules, which appeared to be the case. The making of the declaration was then proved, and it referred to the certificate, which was put in; and Erskine, J., allowed the persons whose names purported to be signed to it, to prove that their names were forgeries, as it might go to show that the declaration was wilfully false. (q)

(o) *Reg. v. Hall*, 8 C. & P. 358, Littledale, J.

(p) *Rex v. Wylde*, 6 C. & P. 380, Park, J. A. J. The correctness of this decision seems questionable. In the case of summary convictions there is no statute which requires magistrates to take down the evidence in writing, and therefore what a party says in an examination before a magistrate on such an occasion may be proved by parol, whether any person took it down or not. *Robinson v. Vaughton*, 8 C. & P. 252, Alderson, B. Inasmuch, therefore, as all the defendant said might have been proved by parol, it is difficult to see how the deposition being put in could prevent other matters not contained in it from being proved by parol. The distinction between depositions

in felony and in summary convictions was not noticed in this case, nor was any reference made to *Rex v. Harris, R. & M. C. C. R. 338*. And the decision in the text appears at variance with the ordinary practice of cross-examining a witness in cases of felony as to other statements made by him before the committing magistrate, after his deposition has been put in and read. C. S. G.

(q) *Reg. v. Boynes*, 1 C. & K. 65. The declaration mentioned the name of the society, and that the prisoner had 'forwarded to the said society a certificate as required by the 24th rule of the said society.' *Quære* whether this was not sufficient evidence against the prisoner when connected with the 24th rule, proved to have been examined with the



The prisoner was indicted for falsely swearing that the signature to a paper was not his signature. On a trial in a county court the paper was produced, and the prisoner swore that he never signed it: the judge directed him to write his name on a piece of paper; which he did, and the judge compared it with the signature to the disputed document. Wightman, J., inclined to think that the jury might look at and compare the two signatures. The signing of the name by the prisoner during his examination on oath formed in fact part of the transaction out of which the charge arose; and the counsel for the prisoner not objecting, the paper was handed to the jury. (r')

A signature of the prisoner during the examination in which the perjury was alleged to be committed.

An indictment alleged that the prisoner falsely swore in a county court that the words J. S. were written by J. S. at the house of M. P. in the parish of St. Mellon's, in the county of G. The proof by the judge's notes was that the prisoner swore as alleged, except that he did not describe M. P.'s house as in the parish of St. Mellon's; but Rolfe, B., held that the allegation might well be made out by showing that M. P.'s house was in that parish. (s)

Description of a house.

Upon an indictment against Moreau for perjury alleged to have been committed in an affidavit in a cause wherein Moreau was plaintiff, and Encontre defendant, by deposing that Encontre owed him 50*l.*, evidence is not admissible that the cause and all matters in dispute were, after the making of the affidavit, referred by consent, and an award made that Encontre owed nothing to Moreau; because the decision of the arbitrator in respect of that fact is no more than a declaration of his opinion, and there is no instance of such a declaration of opinion being received as evidence of a fact against a party to be affected by proof of it in any criminal case. (t)

The award of an arbitrator is not admissible on an indictment for perjury in an affidavit made before the cause was referred to him.

Where perjury is assigned upon the evidence of a witness examined before magistrates on the hearing of an information, the conviction is not admissible in evidence on the trial of the indictment for perjury, as it is irrelevant to the matter in issue. (u)

Conviction before justices, when not admissible.

Where a count alleged perjury to have been committed before magistrates in examining a charge of feloniously receiving stolen silks, knowing them to have been stolen, and it appeared that the evidence was given upon the hearing of an information, under the 17 Geo. 3, c. 56, for having possession of silks suspected to have been purloined or embezzled; Patteson, J., held that the count was not supported, as the evidence was given upon the specific charge contained in the information. (v)

Count for perjury on a charge of receiving stolen goods not supported by proof of perjury on hearing an information under the 17 Geo. 3, c. 56.

The jury may infer the corrupt motive of the defendant from the circumstances of the case, (w) and in order to show that the defendant swore wilfully and corruptly what was not true, evidence

Evidence of

transcript, of the allegations in the indictment? See *Reg. v. Westley*, *ante*, p. 87.

(r) *Reg. v. Taylor*, 6 Cox, C. C. 58. As to comparison of handwriting by court and jury see *post*, *Evidence*.

(s) *Reg. v. Withers*, 4 Cox, C. C. 17.

(t) *Reg. v. Moreau*, 11 Q. B. 1028. The real objection in this case was that the finding of the arbitrator was necessarily inconsistent with the fact of 50*l.*

being due; as it might proceed on the absence or loss of the only evidence that ever existed of the debt, and it rather seems that the prisoner was not examined on the reference.

(u) *Reg. v. Goodfellow*, MSS. C. S. G. and C. & M. 569. See *Rex v. Dowlin*, 5 T. R. 311.

(v) *Reg. v. Goodfellow*, *supra*.

(w) *Reg. v. Goodfellow*, 5 B. & Ald. 929, *ante*, p. 76.

the corrupt intent of the defendant.

Swearing as to the presence of a person on every Sunday within a certain time.

may be given of expressions of malice used by the defendant towards the person against whom he gave the false evidence. (x) The evidence appears to have been received in this case without objection.

The prisoner was indicted for perjury on the hearing of an information against Blackburn for trespassing in pursuit of game; the occupier of the land and two of his men swore that they saw Blackburn on the land on a particular Sunday morning. The prisoner was called by Blackburn as a witness, and swore that Blackburn lodged with him, and that he never was absent from his lodgings on any Sunday morning during the whole time that they lodged together, which included the Sunday on which the alleged offence was committed. Pollock, C. B., was of opinion that the attention of the prisoner ought to have been called to the particular day on which the transaction took place as to which he was asked to speak; and that a general allegation, such as had been made in this case, including all Sundays between two fixed dates, was not sufficiently precise upon which to found an indictment for perjury, and directed an acquittal. (y)

An indictment for perjury charged that prisoner swore on a plaint in the County Court for the price of coals obtained on credit at different times, in which it was a material question whether or not the prisoner had received any coals on credit from P., either on account of himself or A., 'that he had never received any coals on credit from P., either on account of himself or A.' Held, that the allegation in the indictment was not too general, although no specific instance was averred in which the prisoner had received coals on credit from P. At the trial the prisoner was asked three or four times by the advocate and judge whether he did at any time, either on his own account or that of A., have any coals on credit from P., to which the prisoner always answered, 'I did not.' Held, that the prisoner's attention was sufficiently called to the subject so as to found a charge of perjury upon the answer, although no distinct transactions on credit were suggested to him during his examination. (z)

(x) *Rex v. Munton*, 3 C. & P. 498, Lord Tenterden, C. J. 3 Stark. Evid. 860, citing 1 Hawk. c. 69, s. 2. *Rex v. Melling*, 5 Mod. 349. *Reg. v. Muscott*, 10 Mod. 192.

(y) *Reg. v. Stolady*, 1 F. & F. 518. This case is very unsatisfactorily reported; no date is given, or anything more than is above stated. As the proof of the offence was on 'a particular Sunday morning,' the prisoner, if present, must have had his attention drawn to that particular date; and, if absent, still the date would have been known to Blackburn from the summons, and, as he called the prisoner as his witness, he no doubt had communicated the day to him, so that the ground of the decision really did not exist. But supposing the decision to be as reported, it is very confidently submitted that it is erroneous. Suppose a man called to prove an *alibi* swears that he and the prisoner were in Paris during all the month in which the offence was

committed, can it be the law that he is not guilty of perjury because he is not asked as to the particular day? If a man swears that he was not absent from church on any Sunday in January, is not that as precise a swearing as to each and every Sunday as if he were asked as to each in succession? An information, which charges the defendant with killing ten deer between the 1st of July and the 10th of September, without showing the particular days on which they were killed, is good. *Rex v. Chandler*, 1 Ld. Raym. 581. 1 Salk. 378. And where, on a similar information, the evidence was that the defendant did, within such a time and such a time, steal a deer, so that the time was left as uncertain in the evidence as in the information, it was held sufficient. *Reg. v. Simpson*, 10 Mod. R. 248. C. S. G.

(z) *R. v. London*, 12 Cox, C. C. 50, per Bovill, C. J., 'We are all of opinion that this conviction was good. The first

The defendant, although perjury be assigned on his answer, affidavit, or deposition in writing, may prove that an explanation was afterwards given qualifying or limiting the first answer. (a) Defence.

Thus where the perjury was assigned upon an answer in chancery, in which the defendant had sworn that she had received no money; the defendant proved that, upon exceptions taken to this answer for the insufficiency thereof, she had put in another answer, which explained the generality of the first answer, and stated that she had received no money before such a day; and it was held, upon a trial at bar, that nothing could be assigned as perjury which was explained by the second answer, because the second answer clearly showed that that which at first appeared to be perjury was not perjury. (b) General expressions in an answer explained by another answer.

Where an indictment for perjury contains several assignments of perjury, and no evidence is adduced upon one of the assignments, the defendant is not entitled to give any evidence to show that the matter, charged by such assignment to be false, was in fact true. (c) Evidence for the defendant.

The crime of perjury is complete at the time when an affidavit is sworn; it is no defence, therefore, that the affidavit cannot, through certain omissions in the jurat, be received in the Court for which it is sworn. Upon an indictment for perjury, in an affidavit relating to the service of a petition upon a bankrupt, it appeared that the affidavit was signed with the mark of the defendant, and the jurat did not state either where it was sworn, or that the affidavit was read over to the party, and it was proved by a clerk in the Master's office in Southampton Buildings that in cases where the party swearing the affidavit cannot write, the jurat ought, after stating the place where it was sworn, to state that the witness to the mark of the deponent had been first duly sworn, that he had truly, distinctly, and audibly read over the affidavit to the deponent, and saw the mark affixed; and that no affidavit would be received which did not contain this form of jurat when the party could not write. Littledale, J., 'The omission of the form directed by this and other Courts to be used in the jurat of affidavits may be an objection to their being received in the Court, whose rules and regulations the party has neglected to comply with; but I am of opinion that the perjury is complete at the time the affidavit is sworn, and although it cannot be used in the Court for which it is prepared, that nevertheless perjury may be assigned upon it.' (d) So where an affidavit when sworn had been It is no defence that an affidavit is inadmissible by reason of a defective jurat.

question is upon the form of the indictment, that is sufficient in our opinion. The second point is whether the attention of the prisoner was sufficiently called to the transaction he was being questioned about, and we are all of opinion it was amply called to it, even if the second point had been reserved for us; *et per* Willes, J., 'We do not intend to overrule what Pollock, C. B., said, "that the attention of a witness ought to be called to the point upon which his answer is supposed to be erroneous, before a charge for perjury can be founded upon it."' Mr. Greaves in his last edition of 'Russell on Crimes,' makes some observations

*v. Stolady*, which are in accordance with the judgment of the Lord Chief Justice.

(a) 3 Stark. Evid. 860.

(b) *Rex v. Carr*, 1 Sid. 418. 2 Kebl. 576. 3 Stark. Evid. 860. The reporter adds, 'at which unexpected evidence and resolution the counsel for the prosecution were surprised.'

(c) *Rex v. Hemp*, 5 C. & P. 468.

(d) *Rex v. Hailey*, R. & M. N. P. C. 94. 1 C. & P. 258. See *Rex v. Crossley*, *ante*, p. 44, and *Reg. v. Phillpotts*, *ante*, p. 15, that it is perjury as soon as the evidence is given, whatever may after-

marked by the judge's clerk with his initials, but through mistake not then presented to the judge for his signature, but some days afterwards it was signed by the judge; Alderson, B., in the presence of the other Barons of the Exchequer, expressed a clear opinion that perjury might be assigned upon the affidavit, although the judge's signature was omitted. (e)

So it is no defence that the affidavit has not been used for the purpose for which it was made.

Upon an indictment for perjury, it appeared that the defendant had filed a bill in chancery for an injunction, and had made the affidavit, on which the perjury was assigned, in support of the allegations in that bill. The indictment averred the bill to have been filed, and the affidavit exhibited in support of it; and it stated the matters assigned as perjury to be material to the questions arising on the bill; but it did not contain any statement that a motion had been made for an injunction, and it did not appear by the evidence that any such motion had in fact been made. It was submitted that the defendant was entitled to an acquittal. By the practice of the Court of Chancery, an injunction could not be obtained, except for want of an answer, or on the insufficiency of the answer, or on evidence disproving the answer, in none of which cases is the affidavit of the plaintiff admissible; or else *ex parte* before the time allowed to the defendant for answering has elapsed. In the last case, and in that only, could the plaintiff's affidavit be used. The averment, therefore, that the perjury was assigned on the matter material to the bill was not true; it could only be material to an application of a peculiar nature, and it did not appear, and was not alleged, that such an application was ever made. It was answered that the objection, if tenable at all, amounted to this, that perjury could not be assigned upon an affidavit which had not been used. Lord Tenterden, C. J., 'I do not think the averment or proof, the absence of which is objected to, can be necessary. The statements in the affidavit are material to the matters contained in the bill, which is for an injunction; and it may well have been filed in anticipation of a contemplated motion for an injunction, on which it might have been used. Can it make any difference that it afterwards turns out that the motion is not made? The crime, if any, is the same, morally, in each case; and I certainly shall not, where the objection is open hereafter, hold it necessary to give proof of a fact which does not vary the conduct of the party in taking the oath in question.' (f) And it has been since held that an affidavit sworn for the purpose of being used in a cause, but which is neither used nor filed, is nevertheless the subject of perjury. (g)

Or that it has a defective title.

Where an indictment for perjury alleged that the defendant produced before a Master in Chancery an affidavit, 'entitled, in the said Court of Chancery, and in the said suit therein at the suit of the said E. J. C., and also in the said suit therein at the suit of the said Commissioners of Charitable Donations and Bequests in Ireland,' and the affidavit, when produced, appeared to be entitled 'between the Commissioner of Charitable Donations and Bequests in Ireland, against J. E. D., &c. (naming the other defendants), and between E. J. C. and J. E. D., the Commissioners of Chari-

(e) Bill v. Bament, 8 M. & W. 317.

(g) Hammond v. Chitty, Q. B., E. T.

(f) Rex v. White, M. & M. 271. The 1846, MSS. C. S. G. defendant was acquitted.

table Donations and Bequests in Ireland, *and others.*' It was objected that this affidavit was not one on which perjury could be assigned, as there was no such suit as that in which the *Commissioner of Charitable Bequests* were plaintiffs; and the affidavit was improperly entitled, as the names of all the defendants were not stated, and therefore the affidavit was not admissible in the Court of Chancery. Lord Denman, C. J., 'The courts are quite right in not receiving affidavits which are not properly entitled; but I do not think the question whether there be perjury or not depends on the rule as to entitling being strictly complied with.' (*h*)

Where perjury was charged to have been committed in an affidavit of service of notice of an application for leave to issue execution against a shareholder in a joint stock company, and the affidavit was produced, but the notice was not annexed to it; Cockburn, C. J., held that the affidavit was inadmissible. (*i*)

Affidavit without notice annexed to it.

On an indictment for perjury alleged to have been committed on the trial of A. Poole, for an indecent assault, it appeared that the prisoner had sworn that Poole had assaulted her at a certain time and place, but on cross-examination she had admitted that certain liberties had been taken without resistance; whereon the judge directed an acquittal. Poole and others were called to prove that no such assault could have been committed at the time alleged; and it was held that the prisoner was entitled to prove what her conduct was immediately after the alleged assault; that she had made immediate complaint; and that all the evidence which was admissible on the trial of the assault was admissible for the purpose of showing that the prisoner was not guilty. (*j*)

Where perjury alleged to have been committed on trial for an indecent assault.

If any one distinct assignment of perjury be proved, the defendant ought to be convicted. (*k*)

Verdict.

In a case of a prosecution against T. Reilly for suborning one Macdaniel to commit perjury, it was contended on the part of the crown that the bare production of the record of Macdaniel's conviction was of itself sufficient evidence that he had, in fact, taken the false oath as alleged in the indictment. But it was insisted, for the prisoner, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was right; that Reilly had a right to controvert the guilt of Macdaniel; and that the evidence given on Macdaniel's trial ought to be submitted to the consideration of the present jury; and the Recorder obliged the counsel for the crown to go through the whole case in the same manner as if the jury had been charged to try Macdaniel. (*l*)

Proof upon a prosecution for subornation of perjury.

(*h*) Reg. v. Christian, C. & M. 388.

(*i*) Reg. v. Hudson, 1 F. & F. 56.

(*j*) Reg. v. Harrison, 9 Cox, C. C. 503.

(*k*) Reg. v. Rhodes, 2 Lord Raym.

886, 887. 3 Stark. Evid. 860. And see

Compagnon v. Martin, 2 Black. Rep.

790. Reg. v. Virrier, 12 Ad. & E. 317.

Reg. v. Gardiner, *ante*, p. 52. In Rex

v. Nicholls, Gloucester Sum. Ass. 1838,

perjury was alleged to have been committed by the defendant in evidence given

on a trial for larceny, in which he denied

having been at a particular house on a

particular occasion, and denied having had a conversation with certain persons there, and the indictment contained many distinct assignments on the going to the house, and the conversation, upon all of which evidence was given; and Patte-son, J., directed the jury simply to consider whether the defendant had been to the house, and if they were satisfied that he had, to convict him, which they did. MSS. C. S. G.

(*l*) Reilly's case, 1 Leach, 454. See

Where an indictment contained four counts, and the venire and verdict spoke of 'the perjury and misdemeanor aforesaid,' and there was a judgment for a single term of imprisonment, it was held right.

The first count assigned perjury on an affidavit of the defendant, which alleged that the defendant did not retain or employ W. U. to act as attorney for him and J. I., or for either of them, in and about the business mentioned in the said W. U.'s bill of costs; and that he, the defendant, never retained or employed the said W. U. to act as attorney or agent for him in any cause or manner whatever. The second count assigned perjury on the statement in the affidavit as follows:—'that he the said defendant did not retain or employ (meaning that he the defendant did not alone, or jointly with the said J. I., retain or employ) W. U. to act as attorney for him and J. I.' The third count was the same as the first, and the fourth as the second. The plea was, that the defendant was not guilty of the premises in the indictment specified. The venire was 'to recognize whether the defendant be guilty of the perjury and misdemeanor aforesaid, or not guilty.' The verdict was that the defendant 'is guilty of the perjury and misdemeanor aforesaid,' and the judgment that the defendant 'be imprisoned and kept to hard labour for ten calendar months.' It was urged that the venire, the verdict and judgment, were uncertain for not showing to which of the counts they referred. That they were in the singular number, speaking of 'the perjury and misdemeanor aforesaid,' and that this could only mean one perjury and misdemeanor; and that as four were alleged in the indictment, it was uncertain which of them the jury was summoned to try, and of which of them the defendant was found guilty; but the Courts of Queen's Bench and Exchequer Chamber held that 'misdemeanor' was *nomen collectivum*, and meant 'the misconduct aforesaid.' The consequence was that the venire applied to all the counts of the indictment, and that the defendant had been found guilty by the verdict on all the counts. (*m*)

One judgment on several counts.

Where on an indictment for perjury containing several counts the judgment was that the prisoner for the offence charged upon him in and by each and every count be imprisoned for the space of eight calendar months now next ensuing; it was held by the Court of Exchequer Chamber that the judgment was good, on the ground that it meant that the prisoner was to be imprisoned for the same period of eight months for each offence. (*n*)

Punishment of perjury and subornation of perjury.

The punishment of perjury and subornation of perjury, at common law, has been various, being anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods. (*o*) At the present time it is fine and imprisonment, at the discretion of the court, (*p*) to which, as we have already seen, the 2 Geo. 2,

(*m*) Ryalls v. The Queen, 11 Q. B. 781. Rex v. Powell, 2 B. & Ad. 75, was recognized as good law by both courts.

(*n*) King v. Reg. 14 Q. B. 31.

(*o*) 4 Black. Com. 138.

(*p*) 4 Black. Com. 138. Rex v. Nueys and Galey, 1 Black. R. 416. Rex v. Lookup, 3 Burr. 1901. In this last case the form of the sentence was that the defendant 'should be set in and upon the pillory at C. cross, for an hour between the hours of twelve and two, and that he should afterwards be transported to some of his Majesty's colonies or plan-

tations in America, for the space of seven years; and be now remanded to the custody of the marshal, to be by him kept in safe custody, in execution of the judgment aforesaid, and until he shall be transported as aforesaid.' The 1 Vict. c. 23, abolishes the punishment of the pillory in all cases, 'provided that nothing herein contained shall extend, or be construed to extend, in any manner to change, alter, or affect any punishment whatsoever, which may now be by law inflicted in respect of any offence except only the punishment of pillory.'

c. 25, (g) superadds a power for the Court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period ; (r) and makes it felony, without benefit of clergy, to return or escape within the time. If the prosecution proceeds upon the 5 Eliz. c. 9, that statute, as we have seen, (s) inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner ; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory ; (t) and punishes perjury itself with six months imprisonment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory.

The 3 Geo. 4, c. 114, enacts, that ‘ whenever any person shall be convicted of any of the offences hereinafter specified and set forth, that is to say (*inter alia*), of wilful and corrupt perjury, or of subornation of perjury, it shall and may be lawful for the Court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this Act ; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct.’ See vol. 1, p. 78.

3 Geo. 4,  
c. 114. Hard  
labour.

Upon a conviction for perjury at the Chester Assizes, after the entry of the verdict the record proceeded, ‘ it is therefore *ordered* that the said L. K. be transported to the coast of New South Wales, or some one or other of the islands adjacent, for and during the term of seven years ;’ and upon a writ of error the following errors were relied upon ; that the judgment was erroneous in form, being, ‘ it is ordered ;’ whereas it should have been ‘ it is considered ;’ that it was bad in substance, being a judgment of transportation only, whereas the 2 Geo. 2, c. 25, s. 2, enacts that judgment of transportation may be pronounced, *besides* the punishment that might before be inflicted ; that the place, to which the prisoner was to be transported, ought not to have been fixed by the Court, the power of appointing that being given to the King in council by the 56 Geo. 3, c. 27 ; and that at all events the appointment of the place was bad, being to one or other of various places, and, therefore, uncertain. And the Court of King’s Bench held that by the 2 Geo. 2, c. 25, s. 2, two things were required to be done by the Court before which the party was tried ; an order for transportation is to be made, and thereupon judgment is to be given ; and here the Court had made an order not followed up by a judgment. Inasmuch, therefore, as no judgment had been entered in the Court below, and the Court of King’s Bench had no power to supply the deficiency, as the punishment was discretionary, that Court awarded a procedendo,

Judgment in  
case of per-  
jury.

(g) *Ante*, p. 25.

25 July, 1864, vol. 1, p. 73.

(r) Penal servitude for any term not exceeding seven and not less than five years, if the offence was committed after

(s) *Ante*, p. 23.

(t) See note (p), *supra*.

commanding the Court below to proceed to give judgment on the conviction. (x)

The court may require the prisoner to find sureties for his good behaviour after the expiration of his imprisonment.

The Court may also adjudge the defendant to give surety to keep the peace and be of good behaviour for a reasonable time, to be computed from and after the expiration of the term of his imprisonment, himself in a sum named in such judgment, with two sufficient sureties, each in a sum therein also mentioned, and may adjudge the defendant to be further imprisoned until such security be given; and such sentence does not amount to perpetual imprisonment, as in default of sureties being given the defendant would be entitled to be discharged at the expiration of the term during which the sureties were required. (y)

Conviction for perjury incapacitated the offender from giving evidence.

A consequence of a conviction for perjury, though it formed no part of the judgment, was, that the offender was incapacitated from giving evidence in a court of justice. (z) But a pardon restored his competency; except in the case of a conviction for perjury or subornation of perjury on the 5 Eliz. c. 9, (a) which provides that the offender shall never be admitted to give evidence in courts of justice until the judgment be reversed; and, therefore, the King's pardon would not in such case make him a competent witness. (b) But by the 6 & 7 Vict. c. 80, s. 1, a person is competent as a witness though he has been convicted of a crime or offence. (c)

The following cases may be introduced in this place.

An indictment for perjury will not lie under the 7 Geo. 4, c. 57, s. 71, against an insolvent debtor for omissions of property in his schedule.

An indictment for perjury, alleged to have been committed in the Insolvent Debtors Court, stated that the defendant gave in his schedule on oath that the same contained a true and correct account of all his debts, credits, &c., and then went on to state that certain persons, whose names were set out, were debtors to the defendant at the time of giving in his schedule, and that they were omitted in the schedule. It was objected that no indictment for perjury would lie on such omissions; that the offence of wilfully making such omissions was made punishable as a misdemeanor by the 7 Geo. 4, c. 57, s. 70, and the offence of perjury created by sec. 71 only applied to positive affirmations contained in the schedule. Lord Tenterden, C. J., 'I think the legislature contemplated the particular case of omissions, and provided for them in the seventieth section, the debts omitted being comprehended under the terms "effects or property" there used. The Act then goes on in the seventy-first section to make other falsehoods in the oath of the party punishable as perjury. I therefore think the defendant must be acquitted.' (d)

Indictment for a false answer to the third question under the Reform Act.

Upon an indictment against the defendant under the 2 Will. 4, c. 45, s. 58, (e) for giving a false answer to the question whether he had the same qualification to vote as that for which he was registered, it appeared that the defendant had occupied a house at the

(x) *Rex v. Kenworthy*, 1 B. & C. 711.

(y) *Reg. v. Dunn*, 12 Q. B. 1026, decided on the authority of *Rex v. Hart*, 30 How. St. Tr. 1131, 1194, and 1344, where the judges, in answer to a question from the House of Lords, delivered their unanimous opinion that in all cases of misdemeanor the Court might give sentence in that form.

(z) *Gilb. Ev.* 126. *Bull. N. P.* 291.

4 Black. Com. 138. 2 Hawk. P. C. c. 46, s. 101.

(a) *Ante*, p. 24.

(b) 1 Phil. on Evid. 21, and the authorities there cited.

(c) See this Act, *post*, *Evidence*.

(d) *Rex v. Mudie*, 1 M. & Rob. 128.

S. C. as *Rex v. Moody*, 5 C. & P. 23.

(e) This enactment is now repealed, see 35 & 36 Vict. c. 33, sched.



time of the registration, for which he was on the register as a voter, but he had left it before the election, and the landlord's agent had, before the election, given the key of the house to another person, who had put horses into the stable and beer into the cellar, but the rent of such person did not commence till after the election; it was held that the defendant must be acquitted, as there was not evidence as to the determination of the defendant's tenancy. (*f*)

Upon an indictment against the defendant under the 2 Will. 4, c. 45, s. 58, (*g*) for falsely answering that he had the same qualification for which his name was originally inserted in the register of voters, it appeared that the defendant at the time of the registration was occupying a house at Turnham Green, as tenant to Mr. Kay, at the rent of 60*l.* per annum, but he left that house at Lady Day following, and in April commenced the occupation of another house at Turnham Green, as tenant to Mr. L., at a rent of 50*l.* and upwards per annum, and he continued in the occupation of this house from April till the time of the election. The defendant had been told that he had no right to vote before he did so, but he said that he believed he had a right to vote, and that he had been so informed by a committee of two of the candidates, and that their opinion was sufficient to warrant him in voting. It was held that the nature of the qualification being the same, did not give the party a right to vote, merely because it fell within the general terms of the description which he had given to the revising barrister. The identity of the qualification must continue; and if a voter ceased to occupy the premises in respect of which he was registered, he thereby ceased to have a right to vote; and it was no answer to say that, although he had ceased to occupy those premises, he had entered upon the occupation of other premises of equal value. It had been urged that if the statement of the defendant was untrue, he made it under the advice of a committee; but that made very little difference, for if a party made a statement which he knew to be untrue, the opinion of an election committee (which generally had a pretty strong bias one way or the other) did not alter the character of the offence. But still the term 'same qualification' was undoubtedly an equivocal expression, and almost necessarily implied something of opinion as to a matter of law, and the jury ought not to convict a person of a misdemeanor, who possessed property of equal value to that which he held at the time of the registration, if he had acted *bond fide*, and had been guided in his conduct in a matter of law by persons who were conversant with the law, and who had told him that he possessed the same qualification for which his name was originally inserted in the register of voters. (*gg*)

(*f*) *Rex v. Harris*, 7 C. & P. 253, Lord Denman, C. J.

(*g*) See note (*h*), next page.

(*gg*) *Reg. v. Dodsworth*, 8 C. & P. 218. 2 Moo. & Rob. 72, Lord Denman, C. J. In *Reg. v. Irving*, 2 M. & Rob. 75, note (*a*), the same points arose, and Bosanquet, J., was decidedly of opinion that in point of law the qualification was not the same, but said that if the answer was given by the prisoner under a *bond*

*fide* belief that he still retained his qualification, he should be acquitted. In the same note the learned reporters advert to the case where a voter is registered for 'land,' described as in his own occupation, or for 'freehold houses,' in some specified street, and after the registration he sells part of the land which was in his own occupation at the time of the registration, or some of the houses of which he then possessed the freehold; in each

Although a party who has given up the property he rented at the time he was registered cannot vote, still he ought not to be convicted of a false answer to the question in sec. 58, of the 2 Will. 4, c. 45, if he *bond fide* believed he had a right to vote.

Meaning of  
the 'same  
qualification.'

The 'same qualification' in the 2 & 3 Will. 4, c. 45, s. 58, (*h*) means the same identical property. If therefore a party who is registered for a borough as a 10*l*. householder gives up the house in respect of which he is registered, and takes another of superior value within the same borough after the registration and before the election, he loses his vote, and if before and at the time of the election a new tenant has taken possession of the house that the voter has left, and is paying rent for it, the fact that a few articles of the voter's furniture remain in the house, and that the voter retains one of the two keys of it, will make no difference. (*i*)

So a voter in a borough who is registered as a 10*l*. householder in respect of a house in Eldon Place, loses his vote, if after the registration and before the election he removes to another house in Eldon Place, although the house to which he removes is in every respect within the description contained in the register, and both houses are of the same size and value. (*j*) If therefore in such a case the party at an election states, in answer to the question put to him, that he has the same qualification for which his name was inserted in the register, he is indictable under the 2 & 3 Will. 4, c. 45, s. 58. (*k*)

Mode of  
putting ques-  
tions at an  
election.

In a register of a borough the word 'Penkhull,' which denoted a portion of the borough, was put at the head of several names, including that of the defendant, who was on the register in respect of a house in Eldon Place, and it was held that if there was no other Eldon Place in the borough, it was not necessary for the deputy returning officer, in putting the third question under the Reform Act, to add the word 'Penkhull' as part of the description. (*j*)

On an indictment under the 2 & 3 Will. 4, c. 45, for giving a false answer at the poll at an election of members of Parliament for a borough, it is not necessary that the returning officer should himself put the questions to the voters under sec. 58. But it is sufficient if the town clerk do it in his presence and by his direction; neither is it necessary to show that the agent who required the questions to be put was expressly appointed by the candidate; it is sufficient to show that he has acted as agent for the candidate. (*m*)

Wilfully.

The word 'wilfully' in an indictment on the 2 & 3 Will. 4, c. 45, s. 58, for giving a false answer at the poll, should be construed in the same way, and supported by the same sort of evidence, as in an indictment for perjury. To be untrue is not enough; for to be wilful it must have been false to the knowledge of the party at the time; and if he really misconstrues the facts, or misconstrues the law, he would not be guilty of the offence. (*n*)

Indictment.

An indictment under the same sec. against a voter for giving a false answer at the poll, which stated that at a certain election for

case, however, retaining enough in point of value to confer a qualification, and intimate a doubt whether such a party could truly answer the question in the affirmative. C. S. G.

(*h*) This section is now repealed, see 35 & 36 Vict. c. 33.

(*i*) Reg. v. Bowyer, 6 C. & M. 550, 10

teson, J.

(*j*) Reg. v. Ellis, C. & M. 564, Patteson, J.

(*k*) Ibid. See *supra*, note (*h*).

(*m*) Reg. v. Spalding, C. & M. 568, Patteson, J.

(*n*) Reg. v. Ellis, *supra*. See *supra*, note (*h*).

a member of Parliament for the borough of Stoke-upon-Trent, the defendant appeared as a voter, and tendered his vote as such, and that he gave a false answer that he had the same qualification for which he was put on the register, whereas in truth he had not, appears to be bad, because it states all the matters by way of recital, and neither states the writ nor the precept for holding the election, nor that the defendant's name was on the register. (o)

Where on the trial of an indictment on the 2 & 3 Will. 4, c. 45, s. 58, against the defendant for giving a false answer to the question, 'Have you the same qualification for which your name was originally inserted in the register of voters now in force for the city of Bristol?' the sheriff's deputy stated that on the defendant tendering his vote he had asked him the question as set out in the indictment, but did not, at the end of the question, read from the register the line in which his name and qualification were inserted, 'Lucy William, House, Lodge Street.' Wightman, J., held that the defendant must be acquitted, as the particular qualification ought to have been read over. (p)

The first four counts of an indictment upon 5 & 6 Will. 4, c. 76, s. 34, stated that the defendant, upon delivering in a voting paper, in the name of a burgess entitled to vote at the election, was asked by the presiding officer the three questions in the terms of the Act, and then alleged, 'to which questions (each of the two first) the defendant then and there falsely and fraudulently answered, "I am;"' and Williams, J., after consulting Patteson, J., held that these four counts were bad for omitting the word '*wilfully*.' 'Wilfully to make a false answer to the question' proposed was the definition of the offence by the legislature itself, and it was a safe and certain rule that the words of the statute must be pursued. (q)

The prisoner was indicted for falsely answering a question at a municipal election under the 5 & 6 Will. 4, c. 76, s. 34. The prisoner's father, William Goodman, had been a burgess of St. Alban's, and those names remained on the overseer's lists; but he had been absent from home for a considerable time; and the prisoner, whose name was also William, resided in the same house, and paid the parish rates, &c. At a municipal election the prisoner offered to vote, and being asked, 'Are you the person whose name appears as "William Goodman" on the burgess roll now in force,' answered 'Yes.' There was only one William Goodman on the roll. Wightman, J., held that there was no case against the prisoner. (r)

Upon an indictment against the defendant for a misdemeanor, in falsely swearing that he *bonâ fide* had such an estate in law or equity of the annual value of 300*l.*, above reprises, as qualified him to be a member of Parliament for a borough; a surveyor stated that the fair annual value of the property was about 200*l.* a year, but another witness stated that it was badly let, and be-

The description in the register must be read, or the party is not indictable.

An indictment for making a false answer to the questions under the 5 & 6 Will. 4, c. 76, s. 34, at a municipal election must aver that the defendant '*wilfully*' made the false answer.

A father and son of the same name and residence, and the son votes at a municipal election.

Indictment for falsely swearing to a qualification to sit as a member of Parliament.

(o) Reg. v. Bowler, C. & M. 559, per Patteson, J. The defendant was acquitted in this case. In Reg. v. Ellis, C. & M. 564, the indictment was in a similar form, the defendant convicted, and the judgment arrested in the Queen's Bench, no cause being shown.

(p) Reg. v. Lucy, C. & M. 510. This enactment is now repealed, see 35 & 36 Vict. c. 33, sched.

(q) Reg. v. Beut, 1 Den. C. C. R. 157 2 C. & K. 179. The above section is in part repealed by 35 & 36 Vict. c. 33.

(r) Reg. v. Goodman, 1 F. & F. 502.

lieved it was worth more than 300*l.* a year, and that he told the defendant so, and that he did not think that the defendant had any reason to believe that the qualification, in point of value, was not sufficient. It was held that the jury must be satisfied, beyond all doubt, that the property was not of the value of 300*l.* a year, and that, at the time the defendant made the statement, he knew that it was not of that value. (s)

Indictment  
against a ma-  
gistrate for  
administering  
an oath con-  
trary to the  
5 & 6 Will. 4,  
c. 62, s. 13.

The first count of an indictment upon the 5 & 6 Will. 4, c. 62, s. 13, charged that the defendant, being a justice of the peace, did unlawfully administer to and receive from J. Huxtable a certain voluntary oath touching certain matters and things whereof the defendant had not jurisdiction or cognizance by any statute. The second and third counts slightly varied, and the fourth count negatived the proviso in sec. 13. There were other counts charging the defendant with administering oaths to two other persons. The defendant had made a complaint to the bishop against two clergymen, who officiated in his parish, that one had played at thimble-rig, and that both had neglected the duties of the parish. The bishop intimated that, before he could call on the clergymen to answer the complaint, the defendant must either bring before him the persons who proved the charges, or obtain statements in writing of the facts. The defendant obtained statements from the three persons mentioned in the indictment, and swore them before himself, as a justice of the peace, to the truth of the statements. The bishop had before appointed a day for hearing the charges, and had summoned the clergymen to attend; but on finding that the depositions had been thus sworn, he declined to look at them; he went, however, into the charges on other evidence. It appeared that the defendant was ignorant of the statute rendering the administering voluntary oaths illegal. It was contended, that the enacting part of the statute must be construed with reference to the preamble; that the enacting clause, which prohibits 'any justice of the peace, or other person,' from administering oaths, other than in matters over which jurisdiction was given by statute, if taken by itself, would render unlawful the taking of many oaths which could be administered by the common law, that the enactment construed together with the proviso was still too stringent, and that the enactment and proviso must be governed by the preamble. Coleridge, J., in summing up, said, he was of opinion that the enacting part of the statute was not governed by the preamble; that he considered the enacting part of the section and the proviso preserved to justices of the peace all the jurisdiction they had, as well at the common law as by statute, to administer oaths; and that the inquiry before the bishop was clearly a matter in respect of which the defendant had no jurisdiction, either at common law, or by statute. He directed the jury, that, if they were satisfied the defendant did administer the oaths, they should find him guilty. The jury found the defendant 'guilty of inadvertently administering an oath or oaths;' and Coleridge, J., held that that was a verdict of guilty. (t)

(s) *Rex v. De Beauvoir*, 7 C. & P. 17, Lord Denman, C. J. A property qualification for a member of parliament is not now necessary.

c. 26; 37 & 38 Vict. c. 66.

(t) *Reg. v. Nott*, C. & M. 238. See the section, *ante*, p. 30.

But the judgment was afterwards arrested upon the ground that the indictment did not in any count show what the nature of the oath was. There ought to have been a distinct allegation of the subject-matter of the oath, showing affirmatively that it was out of the jurisdiction of the magistrate. The question was matter of law for the Court, and though it was not necessary to set out the whole of the oath, still the facts should have been so stated as to enable the Court to form its opinion upon the question whether the oath was within the jurisdiction of the magistrate or not. (u)

The substance of the oath must be set out.

Where a prisoner was indicted for making a false declaration before a justice in pursuance of the rules of a benefit society, which required a loss by fire in certain cases to be verified by such a declaration; it was objected that the 5 & 6 Will. 4, c. 62, s. 18, did not extend to any declarations except those mentioned in the preamble of that section; but Erskine, J., held that the section extended to all declarations generally. (v)

The 5 & 6 Will. 4, c. 62, s. 18, applies to all declarations.

The prisoner was indicted for swearing a false declaration under the 5 & 6 Will. 4, c. 62, s. 18, that he had done no act to encumber certain lands, and that he was in possession of those lands, and in the receipt of the rents and profits thereof. The declaration was duly sworn and made in support of an application to a building society in 1861, for an advance of 150%. The mortgage deed of 1861 to the building society was produced, but the attesting witness was not called to prove it. The original conveyance of the property to the prisoner was put in. It was objected that the declaration was confirmatory of the mortgage deed, and as that was not proved, it was not shown that the matter sworn was material. It was answered that the declaration was made to confirm the original conveyance, and not the mortgage, which was executed after the declaration. Byles, J., 'I am of opinion that the objection is fatal. The preamble of the 5 & 6 Will. 4, c. 62, s. 18, (w) must be read with the enacting part; and as the deed, which rendered the declaration necessary, is not proved, this indictment cannot be sustained.' (x)

Declaration in support of an application to a building society.

The prisoner was indicted under the 5 & 6 Will. 4, c. 62, s. 12, (y) for making a false declaration before a justice for the borough of Liverpool that she had lost the pawn ticket of certain goods pledged by her. The clerk to the justice could only speak to the handwriting of the justice on the declaration, and, from the great number of these declarations, he could not remember when or where it was made. It was contended that there was no evidence that the declaration had been made before the justice acting as such or even within the borough; and Gurney, B., held that the objection was good. The justice might at all events have proved that he had never taken such a declaration out of the borough. (z)

A declaration under the Pawnbroker's Act must be proved to have been made within the jurisdiction of the justice.

(u) *Reg. v. Nott*, 4 Q. B. 768. In the argument it was contended that the defendant on the finding of the jury had been guilty of no offence, and Lord Denman, C. J., said, 'If the statute in terms create an offence, all persons are bound to know it. But if a statute enacts something, without in terms making it an offence, and you would convict a person of misdemeanor in having disobeyed such an enactment, are you not bound to

show that the disobedience was wilful, and in the nature of a contempt?' But no opinion was pronounced upon this point. See vol. I, p. 192.

(v) *Reg. v. Boynes*, 1 C. & K. 65. See this case, *ante*, p. 94.

(w) *Ante*, p. 31.

(x) *Reg. v. Cox*, 9 Cox, C. C. 301.

(y) *Ante*, p. 30.

(z) *Reg. v. Morgan*, 1 Cox, C. C. 109. No case was cited and this decision re-

Evidence of making a declaration under the Pawnbroker's Act. Two witnesses necessary to prove the falsity of the declaration.

The prisoner was indicted for having at Stroud, in the county of Gloucester, made a false declaration before E. G. Hallewell, a justice of the peace, that he had lost a pawnbroker's ticket. It was opened that the prisoner told the pawnbroker that he had lost the ticket, and the pawnbroker told him he must make a declaration of the loss before a magistrate, and for that purpose handed the prisoner a copy of the ticket and a form, to be filled up according to the Act; the prisoner paid for the form, saying he would go to a magistrate; he returned the same day with the form properly filled up, and with his name and that of Mr. Hallewell attached; but Mr. Hallewell was not able to recollect the fact of the declaration having been made, and therefore was not present; but the pawnbroker identified the declaration. But there was only one witness to prove that the prisoner had not lost the duplicate. Platt, B., 'As regards the proof of the declaration having been made by the prisoner, I think there may be sufficient evidence to support the indictment, if you can bring home to him a knowledge of its contents; but I am of opinion that the falsity of that declaration must be proved by the oaths of two witnesses as in a case of perjury, otherwise there would be but oath against oath.' (a)

quires reconsideration. See the next case, and the note to it.

(a) *Reg. v. Browning*, 3 Cox, C. C. 437. The ruling of the learned Baron was right on both points; though an idle doubt has been raised on the first point. If a man in writing admitted that he had made a declaration before a justice under the Act, no doubt can exist that such writing would be sufficient evidence against him; and in this case the prisoner produced a declaration in the form under the Act, signed by himself and the justice, and dealt with it, and obtained the goods by it, as a valid declaration; and it is perfectly clear that this

was abundant evidence that he had made that declaration in the manner and with the formalities described in it. In *Rex v. Spencer*, 1 C. & P. 260, *ante*, p. 85, Lord Tenterden, C. J., said, 'The courts always give credence to the signature of the magistrate or commissioner; and if his signature to the jurat is proved, that is sufficient evidence that the party was duly sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place.' And see *Rex v. James*, and *Brickell v. Hulse*, *ante*, p. 92, and *Reg. v. Westley*, Bell, C. C. 193, *ante*, p. 87.

## CHAPTER THE SECOND.

## OF CONSPIRACY. (a)

THE conspiring to obstruct, prevent, or defeat the course of public justice; (b) to injure the public health, as by selling unwholesome provisions; (c) or to effect any public mischief (d) as by raising the price of the public funds by illegal means; (e) are offences punishable by indictment. And it appears that an indictment lies, not only wherever a conspiracy is entered into for a corrupt or illegal purpose, but also where the conspiracy is to effect a legal purpose by the use of unlawful means; and this, although such purpose be not effected. (f) And it is laid down in a book of great authority that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter, whether it be true or false. (g) The conspiracy or unlawful agreement, though nothing be done in prosecution of it, is the gist of the offence. (h) The nature of conspiracy therefore, requires that more than one person should be concerned in it. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement amongst themselves, would not have been illegal. (i) It has been said that perhaps few things are left so doubtful in the criminal law, as the point at which a combination of several persons, in a common object, becomes illegal. (j)

Descriptions  
of conspiracy.

(a) The Acts relating to trade disputes will be found at the end of this chapter.

(b) *Rex v. Mawbey*, 6 T. R. 619, *et seq.* 4 Black. Com. 136. 1 Hawk. P. C. c. 72, s. 2.

(c) *Reg. v. Mackarty*, 2 Lord Raym. 1179. 2 East, P. C. c. 18, s. 5, p. 823. 4 Black. Com. 162. And see the remarks upon *Reg. v. Mackarty* in 6 East, 133, 141.

(d) See *R. v. Boulton*, 12 Cox, C. C. 87.

(e) *Rex v. De Berenger*, 3 M. & S. 67.

(f) *Rex v. Journeymen Tailors of Cambridge*, 8 Mod. 11. *Reg. v. Best*, 2 Lord Raym. 1167. 6 Mod. 185. 1 East, P. C. c. 11, s. 11, p. 462. But an action will not lie for a conspiracy unless it be put in execution, 9 Co. 57. *W. Jones*, 93. *Savile v. Roberts*, 1 Lord Raym. 378. And see 8 Mod. 320, that conspiring to do a lawful act, if for an unlawful end, is

indictable. See *post*, p. 110, note (l).

(g) 1 Hawk. P. C. c. 72, s. 2. It is not necessary in an indictment for conspiring to charge a man with being the father of a bastard child, to state that the charge was false, *Reg. v. Best*, *post*, p. 119.

(h) *Reg. v. Best*, 2 Lord Raym. 1167. *Rex v. Spragg*, 2 Burr. 993. *Rex v. Rispal*, 3 Burr. 1320. Per Tindal, C. J., *O'Connell v. Reg.* 11 Cl. & F. 155, *post*, p. 141.

(i) By Grose, J., in *Rex v. Mawbey*, 6 T. R. 636. And see *Rex v. The Journeymen Tailors of Cambridge*, 8 Mod. 11. *Reg. v. Rowlands*, 17 Q. B. 671, *post*. See the new Act, 38 & 39 Vict. c. 86, s. 3, *post*, p. 161, as to when an agreement or combination by several in furtherance of a trade dispute is not indictable.

(j) 3 Chit. Crim. L. 1139.

It appears, however, to have been holden that if such persons illegally concur in doing an act they may be guilty of conspiracy, though they were not previously acquainted with each other. (*k*) It has been laid down that conspiracy is 'a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means.' (*l*) And also that 'the crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent, or even lawful.' (*m*)

Conspiracies  
against the  
public justice  
of the king-  
dom by agree-  
ing to make  
false charges  
and accusa-  
tions.

Amongst the most flagrant instances of conspiracies against the public justice of the kingdom, may be mentioned a case in which the defendants were charged with a conspiracy, in causing a man to be executed for a robbery, which they knew he was innocent of, with intent to get into their possession the reward offered by Act of Parliament. (*n*) And it would have been equally a conspiracy, though the defendants had failed in their infamous design, and the man had been acquitted. Indeed one of the more ancient descriptions of conspiracy is 'a consultation and agreement between two or more to appeal, or indict an innocent person falsely and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterwards the party is lawfully acquitted by the verdict of twelve men.' (*o*) But of this description it is observed, that the lawful acquittal of the party grieved does not appear to be required in order to make the offenders guilty of conspiracy. (*p*) The description of conspirators in the old statute, 33 Edw. 1, st. 2 (sometimes cited as 21 Edw. 1), is 'that conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries of fees for to maintain their malicious enterprizes; and this extendeth as well to the takers as

(*k*) By Lord Mansfield in the case of the prisoners in the King's Bench, Hil. T. 26 Geo. 3. 1 Hawk. P. C. c. 72, s. 2, in the notes. See *post*, p. 149.

(*l*) Per Alderson, B. Reg. v. Vincent, 9 C. & P. 91, and in Rex v. Seward, 1 A. & E. 713. Lord Denman, C. J., said, 'An indictment for conspiracy ought to show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means;' but in Reg. v. Peck, 9 A. & E. 686, the learned Chief Justice, upon this dictum being cited, said, 'I do not think the antithesis very correct;' and in Reg. v. King, 7 Q. B. 782, the same learned Chief Justice said, 'The words "at least" should accompany that statement.' In Rex v. Jones, 4 B. & Ad. 345, 1 N. & M. 78, however, several learned judges gave a similar definition of the crime of conspiracy. And see *ante*, p. 109, note (*f*). C. S. G. See R. v. Bunse, 12 Cox, C. C. 316.

(*m*) Per Tindal, C. J., delivering the

opinion of all the judges in O'Connell v. Reg., 11 Cl. & F. 155, *post*, p. 141.

(*n*) Rex v. Macdaniel, 1 Leach, 45. And see Fost. 130. See also *ante*, vol. 1, p. 662. It should seem that the only objection to this being treated as a conspiracy was that which might arise from its being considered as a crime of the highest degree (*i. e.*, murder, in which the misdemeanor would be merged.

(*o*) 3 Inst. 143. 4 Black. Com. 136.

(*p*) 1 Hawk. P. C. c. 72, s. 2. In the case of Rex v. Spragg, 2 Burr. 998, Serjt. Davy said, 'There is a distinction between a writ of conspiracy and an indictment for conspiracy. In an action the damage is the gist of the action; and therefore the writ and declaration must charge "that he was indicted and sustained damage;" but that is not necessary in an indictment, which is for an offence against the public. And this distinction explains Lord Coke's meaning in 3 Inst. 143.'



to the givers, and to stewards and bailiffs of great lords, who by their seigniority, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves.' From which definition of conspirators it is said that it seems clearly to follow that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not; for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution or not. (q) But it is also said that since it does not appear to have been solemnly resolved that persons offending by a false and malicious accusation against another are indictable upon this statute, it seems to be more safe and advisable to ground an indictment for such offence upon the common law than upon the statute. (r)

A conspiracy of this kind appears, therefore, to consist in the unlawful agreement to injure a person by a false charge; though it be in no way prosecuted. And whether the conspiracy be to charge a temporal or an ecclesiastical offence on an innocent person, it is the same thing. (s)

A conspiracy to indict a person for the purpose of extorting money from him is a misdemeanor, whether the charge be or be not false. (t)

It seems not to be any justification of a confederacy to carry on a false and malicious prosecution, that the indictment or appeal which was preferred, or intended to be preferred in pursuance of it, was insufficient, or that the court wherein the prosecution was carried on or designed to be carried on had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was, in truth, in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law. (u) Therefore, on an indictment for wickedly and unlawfully conspiring to accuse another of taking hair out of a bag, without alleging it to be an unlawful and felonious taking, it was said by Lord Mansfield that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge, and that whether the conspiracy be to charge a man with criminal acts, or such only as may affect his reputation, it is sufficient. (v)

It is observed that it appears not only from the words of the statute, but also from the plain reason of the thing, that no confederacy whatsoever to maintain a suit can come within the words

The false charge need not be prosecuted.

The confederacy to make false charges, &c., will be equally criminal, though the proceedings intended to be instituted were defective.

But the confederacy must be false and malicious, and

(q) 1 Hawk. P. C. c. 72, s. 2.

(r) Ibid.

(s) Reg. v. Best, 2 Lord Raym. 1167.

1 Salk. 174.

(t) Rex v. Hollingberry, 4 B. & C. 329.

6 D. & R. 345. S. P. Reg. v. Jacobs,

1 Cox, C. C. 173; but whether the charge

be true or false is material on the question whether the prosecution was *bona* or *malâ fide*. Ibid.

(u) 1 Hawk. P. C. c. 72, s. 3.

(v) Rex v. Rispal, Black. R. 368. 3 Burr. 1320. And see Pippet v. Hearn, 5 B. & A. 634, ante, p. 53, note (n).

persons may consult to prosecute a guilty person.

Conspiracy to pervert the course of justice, by producing a false certificate of a highway being in repair.

Argument of the counsel for the prosecution.

of the 33 Edw. 1, stat. 2, unless it be both false and malicious. (*w*) And several persons may lawfully meet together and consult to prosecute a guilty person, or one against whom there is probable cause of suspicion; but not to prosecute one that is innocent, right or wrong. (*x*) And associations to prosecute felons, and even to put the laws in force against political offenders, are lawful. (*y*)

It has been held that a certificate by justices of the peace that an indicted highway is in repair, is a legal instrument, recognized by the courts of law, and admissible in evidence after conviction, when the court is about to impose a fine; and that, consequently, it is illegal to conspire to pervert the course of justice by producing a false certificate in evidence to influence the judgment of the court. The indictment stated that a highway was indicted as being out of repair, and a plea of not guilty, but that it was intended to apply to withdraw the plea and plead guilty; that two justices of the county, and two other persons, conspired to pervert the course of justice and impose on the court by producing a false certificate from the two defendants, who were justices, that the road was in repair, and that they did so. There was a verdict against the two justices, and a rule was obtained to arrest the judgment. Upon showing cause against this rule the counsel for the prosecution went at large into a discussion of the doctrine and nature of conspiracies. He said that it follows from the very nature of the offence of conspiracy that there is no charge of any specific crime, but it consists wholly in the unlawful combination; and this will appear fully by adverting to the several sorts of conspiracy to be found in the Books. 1. Where the subject-matter is neither *malum prohibitum*, nor *malum in se*, as referred to the individual; but the criminality in law arises wholly from the conspiracy. Such as an agreement to maintain each other, right or wrong; (*z*) or a combination amongst labourers or mechanics to raise their wages. (*a*) So where several conspired to hiss at the Birmingham Theatre, Lord Mansfield held it indictable, although each might have done so separately. (*b*) So a combination between officers in the service of the East India Company to resign their commissions was held an illegal act; and consequently a resignation tendered under those circumstances was held not to be a determination of the service. (*c*) 2. Where the subject-matter is not *malum prohibitum*, as referred to the individual, though *malum in se*; but the criminality in law arises from the conspiracy, such as a malicious combination against a trader to ruin him in his trade. (*d*) So the taking up dead bodies, even though for the purpose of science in dissecting them, is now held an indictable offence *per se*; (*e*) yet formerly it was not so considered, but even then it was held that an indictment lay for conspiracy to do so. (*f*) A false indictment

(*w*) 1 Hawk. P. C. c. 72, s. 7.

(*x*) Reg. v. Best, 1 Salk. 174. And see 1 Hawk. P. C. c. 72, s. 7.

(*y*) Reg. v. Murray, 1 Chit. Burn's Just. 817. Matth. Dig. 90. Abbott, C. J., Guildhall, 1823.

(*z*) 9 Co. 56.

(*a*) 8 Mod. 10; but see Reg. v. Rowlands, 17 Q. B. 671, *post*, p. 171.

(*b*) Anon., B. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100. Chit. Crim. L. 36.

(*c*) 4 Burr. 2472.

(*d*) 1 Stra. 144. 1 Lev. 125. Reg. v. Eccles, 1 Leach, 274, *post*, p. 124. Reg. v. Rowlands, 17 Q. B. 671, *post*, p. 171.

(*e*) Reg. v. Lynn, 2 T. R. 733.

(*f*) Reg. v. Young, cited in 2 T. R. 733. This was an indictment for a conspiracy to prevent the burial of a corpse. And see a precedent for such a conspiracy, Chit. Crim. L. 36.

is no crime as referred to the individual, (g) but a conspiracy for that purpose subjects the offenders to the villanous judgment. (h) The private slander of another by an individual is not indictable; but conspiring to charge another with slanderous matter is so, (i) though no legal charge be actually preferred. (j) And in this latter case it was held that the Quarter Sessions had jurisdiction over conspirators. It is the same with private immorality, which is only indictable when coupled with a conspiracy. (k) So two or more joining to do legal acts with a corrupt intent may be indicted. (l) And private deceits, coupled with a conspiracy, are indictable on that account. (m) 3. The third head of conspiracy is where the subject-matter is *malum prohibitum*, as referred to the individual, and the criminality in law is thereby aggravated if executed. Of this nature is the bare attempt to subvert religion, (n) or public justice; and the latter will apply to both descriptions of counts in the indictment. Such also is the endeavour to dissuade witnesses from giving evidence, (o) or the preparation of witnesses, (p) or the tampering with jurors. (q) Such are public frauds in trade, (r) or public cheats, (s) or deceit or collusion in the King's courts, or any consent thereto. (t) 4. Where there is a bare conspiracy unexecuted, (u) or where the conspiracy by the execution merges in a higher offence. (v) And he then argued that the offence charged against the defendants fell within the principles of the above cases. In giving his judgment in this case, Ashhurst, J., said, 'The principal question is, whether a conspiracy to pervert the course of justice by producing in evidence a false certificate be or be not a crime? It seems to me that a greater offence can hardly be stated than that of obstructing or perverting the course of justice, on which the lives and properties of all the subjects depend.' And Grose, J., said, 'It is laid down in some of the cases that an attempt to persuade another not to give evidence in a court of justice is indictable; then it cannot be doubted but that an attempt to mislead the court by misrepresentation is equally criminal. The course of justice is perverted if the certificate of the justices be false. If they agree to certify that a road is in repair for the purpose of perverting the course of justice it is a crime and indictable; and it is not necessary that they should know at the time of such agreement that the road is out of repair; it is sufficient that they did not know that the fact which they certified to be true was true.' And Lawrence, J., said, 'The question is, whether a conspiracy to do an act from which the public may receive any damage be or be not

Opinions of  
the judges.

(g) 1 Ed. 3, stat. 2, c. 11. 2 Black. Rep. 1328, 9.

(h) Ibid. See as to the judgment, *post*, p. 158.

(i) 1 Lev. 62. 1 Vent. 304.

(j) 1 Salk. 174. 1 Stra. 193. 3 Burr. 1320.

(k) 1 Salk. 382, 552. 3 Burr. 1434, 1878. 2 Lord Raym. 1031. 4 St. Tr. 515.

(l) *Rex v. Robinson*, 1 Leach, 37. 8 Mod. 321. 1 Wils. 41. 3 Burr. 1439.

(m) 6 Mod. 42, 301. 2 Burr. 1127. 2 Stra. 866.

(n) Fitzg. 66.

(o) 1 Hawk. P. C. c. 21, s. 15. 2 Stra.

904. And see *Rex v. Steventon*, 2 East, R. 362.

(p) Hob. 271. 3 Inst. 106. 2 Show. 1.

(q) 1 Saund. 300. 1 Lord Raym. 148.

1 Burr. 510. *Rex v. Jolliffe*, 4 T. R. 285. Co. Lit. 157.

(r) 1 Sess. Cas. 217. Comb. 16. 1 Sid. 409. 1 Ventr. 13.

(s) 5 St. Tr. 486. 1 Latch. 202. 1 Roll. Rep. 2. 2 Lord Raym. 865. 1 Barnard. 330.

(t) 3 Edw. 1, c. 29. 2 Inst. 212, 217.

(u) 1 Lev. 62, 125. 1 Vent. 304. 3 Burr. 1320. 1 Lord Raym. 379. 1 Salk.

174. 1 Stra. 193. T. Raym. 417.

(v) 1 Lord Raym. 711.

indictable? At first I thought this a very doubtful case, because it struck me that this was an act by which the public would not suffer, as the court of the assizes were not bound to receive the certificate of the defendants, it not being on oath. But on examination it appears that the practice of receiving the certificates of magistrates respecting the state of roads, has existed as far as the memory of living persons extends, and the Books carry it still further back. I have not been able to discover how or when the practice of receiving these certificates arose; but a practice that has been adopted in the courts at least as long back as the reign of Charles the First, goes a great way to show what the law is upon the subject. And this is not the only instance of receiving certificates in evidence; certificates of bishops with respect to marriages are received; the customs of London are certified by the recorder; so formerly were certificates received from the captain of Calais; and in Cro. Eliz. 502, this court said that they would give credit to the certificates of the judges in Wales respecting the practice of their court, and that the custom of the court is a law in that court.' (w)

A conspiracy to defeat an information.

Where one brother had executed a conveyance of land to another for the avowed object of giving the latter a colourable qualification to kill game, and to get rid of an information then pending against him, it seems to have been considered as quite clear that they were both guilty of an indictable conspiracy. (x)

A conspiracy to cause a person, who had been bound over to prosecute, not to do so. If the necessary effect of a conspiracy be to defeat the ends of justice, it must be taken that that was the object of the conspiracy.

A count alleged that C. Staden, J. James, and J. Broome had been committed for trial for having, by cheating and false pretences, obtained from W. Hamp 300*l.*, and that W. Hamp had been bound by recognizances to prosecute them; and that W. Hamp, W. Watkins, and W. Probert, intending to defeat the due course of law, did agree amongst themselves and with the wife of the said J. Broome that W. Hamp should not attend to prosecute or give evidence, and should receive, in consideration thereof, 400*l.* from the said wife of J. Broome; and then alleged that W. Hamp did receive the 400*l.* The three following counts alleged the object to be to defeat and obstruct the due course of law. The prefatory averments were proved, and the wife of J. Broome proved that, prior to the trial for cheating Hamp, she met the now defendants at a tavern; they said that they were sorry to carry on the prosecution; and if she would give them 500*l.* they would not do so; and after some conversation it was arranged that a cheque for 400*l.* should be given, and it was given, and W. Hamp thereupon told her that they would not further prosecute her husband. W. Hamp had been bound by recognizances in 500*l.* to prosecute. For the defendants it was alleged that J. Broome had such influence over W. Hamp that the latter had made an affidavit exculpating J. Broome from any participation in the fraud, and that he was thus placed in the dilemma that, if he did not prosecute, he forfeited his recognizances, and, if he did prosecute, he might be indicted for perjury; and that Probert, who was his guardian, in order to extricate his ward from this position, had been a party to the compromise, but without any intention to do wrong, or to obstruct

(w) *Rex v. Mawbey*, 6 T. R. 619 to 638. (x) *Doe dem. Roberts v. Roberts*, 2 B. 367.

the course of justice. But Lord Campbell, C. J., held that, if the necessary effect of the agreement was to defeat the ends of justice, that must be taken to be the object; and the jury were directed to say, on the first and second counts, whether the defendants did agree not to prosecute as therein alleged; and on the third and fourth counts whether they conspired to obstruct and defeat the ends of justice. If they did so agree and conspire, whatever might be their private reasons, it was the duty of the jury to convict the defendants. (y)

Where the plaintiff had been arrested for 38*l.* at the suit of Cohen, and Blake had become bail for her, and some proceedings had been taken against him as bail, and Blake, Cohen, Swaysland, and Solomon went to the plaintiff's lodgings, and Blake said he must have his money or the plaintiff must go to gaol, and stated that Swaysland and Solomon were officers, which was not the fact; and the plaintiff being frightened, delivered to Blake a watch and other articles, and Swaysland and Solomon wrote two papers, which were signed by the plaintiff and Blake, and which papers stated that the articles were deposited with Blake as a security, and that he should be at liberty to sell them within forty-two days unless he was paid in the meantime; Lord Lyndhurst, C. B., held that, as the defendants all acted in concert, they were guilty of a conspiracy, for which they might all have been indicted. (z)

Conspiracy by a bail and others to obtain security from the defendant.

It has been held to be an indictable offence to conspire on a particular day by false rumours to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day, and that the indictment was well enough without specifying the particular persons who purchased as the persons intended to be injured, and that the public government funds of this kingdom might mean either British or Irish funds, which since the Union were each a part of the United Kingdom. After argument in arrest of judgment, Lord Ellenborough, C. J., said, 'I am perfectly clear that there is not any ground for the motion in arrest of judgment. A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities, and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives a fictitious price by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day.' Bayley, J., 'It is not necessary to constitute this an offence that it should be prejudicial to the public in its aggregate capacity, or to all the King's subjects, but it is enough if it be prejudicial to a class of the subjects. Here then is a conspiracy to effect an illegal end, and not only so,

Conspiracy to raise the price of the public funds on a particular day by false rumours.

(y) *Reg. v. Hamp*, 6 Cox, C. C. 167. Lord Campbell, C. J., held that the facts did not support counts charging a conspiracy to obtain money from the wife of J. Broome, with intent to cheat him of it. The first count had only the word 'agree'

and not conspire, and on its being said that this count did not charge a conspiracy, Lord Campbell said, 'Nothing turns on that. Conspire is nothing: agreement is the thing.'

(z) *Bloomfield v. Blake*, 6 C. & P. 75.

but to effect it by illegal means, because to raise the funds by false rumours is by illegal means. And the end is illegal, for it is to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation.' Dampier, J., 'I own I cannot raise a doubt, but that this is a complete crime of conspiracy according to any definition of it. The means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase.' (a)

Conspiracy to impoverish the farmers of the excise.

In the argument upon the foregoing case an authority was cited where the defendants being acquitted of all but conspiring to impoverish the farmers of the excise, it was objected that there was no offence; but the Court held it well, because the information showed that the excise was parcel of the revenue of the crown, and so the impoverishment of the farmers of excise tended to prejudice the revenue of the crown. (b)

To raise the price of oil.

It seems that parties may be guilty of a conspiracy to raise the price of oil by making fictitious sales. (c)

Conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs.

A conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs is a misdemeanor at common law. The counsel for the defendant proposed to argue that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of a coast waiter, and that, however reprehensible such a practice might be, it could only be made an indictable offence by Act of Parliament. But Lord Ellenborough, C. J., said, 'If that be a question it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the case of *Rex v. Vaughan*, (d) it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor.' And Grose, J., in passing sentence, likewise observed that there could be no doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law. (e)

Conspiracies to commit riots.

Precedents are to be met with in the Books of indictments for conspiracies to commit riots. (f) And in one case, it was said by a learned judge, with respect to premeditated and systematic tumults at a theatre, that 'the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment.' (g)

(a) *Rex v. De Berenger*, 3 M. & S. 67. *R. v. Gurney*, 11 Cox, C. C. 414.

(b) *Rex v. Starling*, 1 Sid. 174.

(c) *Rex v. Hilbers*, 2 Chitty Rep. 163. This was a motion for a criminal information for a conspiracy to raise the price of oil by making fictitious sales, and the court held that it must appear that two combined together, and that one of them

for an individual separately to endeavour.

(d) 4 Burr. 2494. Vol. 1, p. 309.

(e) *Rex v. Pollman*, 2 Campb. 229.

(f) 2 Chit. Crim. L. 506, note (a). See *Rex v. Vincent*, 9 C. & P. 91.

(g) By Mansfield, C. J., in *Clifford v. Brandon*, 2 Camp. 369. *Gregory v. The Duke of Brunswick*, 6 M. & G. 953. 3 B. & A. 481. 1 C. & K. 24.

Where some of the counts of an indictment charged the defendant with conspiring to cause a great number of persons to meet together for the purpose of exciting discontent and disaffection in the minds of the subjects of the Queen, and for the purpose of exciting the said subjects to hatred and contempt of the government and constitution, and it appeared that a large number of persons had assembled at meetings, at which violent speeches had been made respecting the government and constitution and the people's charter, Alderson, B., told the jury, 'The purpose which the defendants had in view, as stated by the prosecutors, was to excite disaffection and discontent, but the defendants say that their purpose was by reasonable argument and proper petitions to obtain the five points mentioned by their learned counsel. If that were so, I think it is by no means illegal to petition on those points. The duration of Parliaments and the extent of the elective franchise have undergone more than one change by the authority of Parliament itself; and with respect to the voting by ballot, persons whose opinions are entitled to the highest respect are found to differ. There can also be no illegality in petitioning that members of Parliament should be paid for their services by their constituents; indeed, they were so paid in ancient times, and they were not required to have a property qualification till the reign of Queen Anne, and are now not required to have it in order to represent any part of Scotland or the English Universities.' And the learned Baron directed the jury to say whether they were satisfied that the defendants conspired to excite disaffection, and if they were to find them guilty of conspiracy. (*h*)

Conspiracies to excite discontent and disaffection.

Several cases have occurred in which the conspiring and contriving, by sinister means, to marry a pauper of one parish to a settled inhabitant of another, in order to bring a charge upon it, have been considered as indictable offences. (*i*) It is observed respecting a conspiracy of this kind, that, considering the offence is a prostitution of the sacred rites of marriage, for corrupt and mercenary purposes, and that, by artful and sinister means, persons are seduced into a connection for life without any inclination of their own, and contrary to that freedom of choice which is peculiarly required in forming so close an union, and on which the happiness of them both so entirely depends; and this for the sake of some gain or saving to others who bring about such marriage; in this light it seems a fit ground for criminal cognizance, not only as being a great oppression upon the parties themselves more immediately interested, but as an offence against society in general, being an abuse of that institution by which society is best continued and legal descents preserved, and a perversion of the purposes for which it was ordained. (*j*) But where, upon an indictment against parish officers for a conspiracy of this kind, it appeared that a man of one parish having gotten a woman with child belonging to another, the defendants had agreed with the man (who was

Conspiring to marry paupers in order to charge a parish.

(*h*) *Reg v. Vincent*, 9 C. & P. 91. See *O'Connell v. Reg.*, 11 Cl. & F. 155, *post*. Since this case the Ballot Act has passed (see 35 & 36 Vict. c. 33); and the property qualification of members of Parliament has been abolished by 21 & 22 Vict. c. 26.

(*i*) *Rex v. Tarrant*, 4 Burr. 2106. *Rex v. Herbert*, 1 East, P. C. c. 11, s. 11, p. 461. *Rex v. Compton*, Cald. 246. 8 Mod. 320.

(*j*) 1 East, P. C. c. 11, s. 11, p. 461.

of the age of 29), with the approbation of his father, to give him two guineas if he would marry the woman, and that he afterwards married her on such condition, and received the money from the defendants immediately after the marriage; and it was also sworn, both by the man and the woman, that they were willing to marry at the time; Buller, J., directed an acquittal, notwithstanding the proof of the money having been given to procure such consent; and this after the putative father had been taken up under a magistrate's warrant, and was in custody of the overseers. And that learned judge held it necessary, in support of such an indictment, to show that the defendants had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage without the voluntary consent or inclination of the parties themselves; and that the act of marriage, being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means. (*k*)

In a case where the indictment stated the marriage to have been procured by threats and menaces against the peace, &c., it was holden to be sufficient, without averring in terms that the marriage was against the will or consent of the parties, though that must be proved. (*l*)

Rex v. Seward.

And it has since been held that an indictment does not lie for conspiracy merely to exonerate one parish from the charge of a pauper and to throw it on another, nor for conspiring to cause a male pauper to marry a female pauper for that purpose, it not being stated that the conspiracy was to effect such marriage by force, threats, or fraud, or that it was so effected in pursuance of the conspiracy. (*m*) An allegation in such an indictment that a poor unmarried woman in a parish was with child is not equivalent to an allegation that she was chargeable to such parish. (*n*) And it has been doubted whether an allegation that the defendants conspired together for the purpose of exonerating, is equivalent to an allegation that they conspired to exonerate. (*o*)

Upon an indictment for conspiring together, and giving the husband money to marry a poor helpless woman, who was an *inhabitant* of B., in order to settle her in the parish of A., where the husband was settled, judgment was arrested, because it was not averred that she was last legally settled in B. (*p*) But it is observed, that it seems to be perfectly immaterial where the woman's settlement was, if it were not in A., provided that fact distinctly appeared. (*q*) It is further said, however, that it is usual to aver the settlements of the parties in their respective parishes, and also that the woman was chargeable to her own parish at the time, though this latter has never been adjudged to be necessary, nor seems to be required according to the general rules which govern the offence of conspiracy. (*r*) It should seem that in

(*k*) Rex v. Fowler, 1 East, P. C. c. 11, p. 461. And the learned judge said that this point had been so ruled several times by several judges.

(*l*) Rex v. Parkhouse, 1 East, P. C. c. 11, s. 11, p. 462, Buller, J.

(*m*) Rex v. Seward, 1 A. & E. 706. 3 N. & M. 557.

(*n*) Per Lord Denman, C. J., and

Taunton, J., *ibid*.

(*o*) Per Williams, J., *ibid*. citing Rex v. Nield, 6 East, 417. But see Rex v. Ridgway, 5 B. & Ald. 527, where Rex v. Nield was doubted by Lord Tenterden, C. J.

(*p*) Rex v. Edwards, 8 Mod. 320.

(*q*) 1 East, P. C. c. 11, s. 11, p. 462.

(*r*) *Id. ibid*.



such cases both the purpose and the means used are clearly unlawful.

Conspiring to let a pauper land to the intent that he may gain a settlement is illegal. (s)

Conspiring to charge a man with being the father of a bastard child, with intent to extort money from him, is indictable; and where the object is stated to be to extort money, it is immaterial whether the woman is or is not pregnant. (t) And conspiring to make such a charge, though without any intent to extort money, is indictable; and it is not necessary to state in the indictment that the charge was false, or that the child was likely to be chargeable. The court doubted upon the objection that the charge was not stated to be false, but ultimately they held the indictment to be sufficient, as the defendants were at least charged with conspiring to accuse the prosecutor of fornication, and although that was spiritual defamation, conspiring to do it was a temporal offence. (u)

Conspiracy to charge a man with being the father of a bastard child.

The frauds practised by swindlers may sometimes be indictable as conspiracies. In a case which has been mentioned in a former part of this work, (v) where the prisoner had been acquitted upon a charge of forgery, he was afterwards indicted with two of his associates for a conspiracy to defraud. The indictment charged that the defendants Hevey, Beatty, and M'Carty, fraudulently and unlawfully conspired that Beatty should write his acceptance to a certain paper-writing, purporting to be a bill of exchange, &c. (the tenor of which was set out) in order that Hevey might, by such acceptance, and by the name M'Carty being indorsed on the back thereof, negotiate the said paper-writing as a good bill of exchange, truly drawn at Bath, by one Jer. Connell, for Smith and Co., as partners in the business of bankers, under the style of Bath Bank, as persons well known to them the said defendants, and thereby fraudulently to obtain from the King's subjects goods and monies; that Beatty, in pursuance of such conspiracy and agreement, did fraudulently and unlawfully *write his acceptance* to the said paper-writing to the tenor following, viz., 'Accepted, 20 Nov.—81, R. B.,' well knowing the firm of Smith and Co. to be fictitious; that the defendants procured the indorsement 'B. M'Carty' to be written on the same, and that the said Hevey, in pursuance of such fraudulent conspiracy, did utter the said paper-writing to one S. Read, as and for a good bill of exchange, truly drawn, &c., and accepted by the said Beatty as a person able to pay the said sum of 30*l.*, in order to negotiate the same, and by means thereof did fraudulently obtain a gold watch, value twelve guineas, and 7*l.* 8*s.* in money; whereas, in truth, at the time of drawing, accepting, and uttering the said bill, there were no such persons as Smith and Co. in the business of bankers at Bath, and the said Beatty was not of sufficient ability to pay the said 30*l.*, they, the defendants, well knowing the same, &c., whereby they defrauded the said S. Read of the said goods and monies. The facts so charged being fully proved, the defendants were convicted. (w)

Conspiracies to defraud.

Conspiring to make a fraudulent acceptance of a bill of exchange.

(s) *Per cur.* *Rex v. Edwards*, 8 Mod. 320.

(v) Vol. 2, p. 630.

(t) *Rex v. Armstrong*, 1 Ventr. 304. 1 Lev. 62. Sid. 68.

(w) *Rex v. Hevey*, 2 East, P. C. c. 19, s. 5, p. 858, note (a). Anonymous, 1782. MSS. Bayley, J., Rosc. Cr. Evid. 368.

(u) *Reg. v. Best*, 2 Lord Raym. 1167.

Conspiracy to  
defraud  
tradesmen.

In one case the defendants were convicted on an indictment which charged them with a conspiracy to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen. (*x*)

Conspiracy of  
brokers at-  
tending sales  
by auction.

Where in an action for slander it appeared that certain brokers were in the habit of agreeing together to attend sales by auction, and that one of them only should bid for any particular article, and that after the sale they should have a meeting consisting of themselves only, at another place, to put up to sale among themselves, at a fair price, the goods that each had bought at the auction, and that the difference between the price at which the goods were bought at the auction, and the fair price at this private resale, should be shared among them; Gurney, B., was of opinion that, as owners of goods had a right to expect at an auction that there would be an open competition from the public, if a knot of men went to an auction upon an agreement among themselves of the kind that had been described, they were guilty of an indictable offence, and might be tried for a conspiracy. (*y*)

A mock auction, with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth, is an offence at common law; and persons aiding or abetting such a proceeding may be indicted for a conspiracy with intent to defraud. (*z*)

Conspiring to  
fabricate  
shares in ad-  
dition to the  
limited num-  
ber of which  
a joint stock  
company  
consists.

Where an indictment alleged that a certain joint stock company had been established, the capital of which was to consist of 2,000 shares, and charged the defendants with conspiring to fabricate a great number of other shares in addition to the said 2,000, and it appeared that the company had not been legally established; Abbott, C. J., was of opinion that if, in point of fact, a combination to the effect stated in the indictment were made out, such conduct, in point of law, constituted an offence punishable in a criminal way, notwithstanding the original imperfection of the company's formation. (*a*)

Conspiracy to  
barter un-  
wholesome  
wine.

The selling unwholesome provisions is, as we have seen, an indictable offence; and the following case of bartering bad and unwholesome wine appears to have been treated as a conspiracy. The indictment charged that the defendants, falsely and deceitfully intending to defraud Thomas Chowne of divers of his goods, &c., together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine, of him the said Fordenborough, for a certain quantity of hats of him the said Chowne; and that, upon such bartering, &c., the said Fordenborough pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines; and the said Mackarty, on such bartering, &c., pretended to be a broker of London, when, in fact, he was not, and that the said Chowne, giving credit to the said fictitious assumptions, personating, and deceits, did barter, sell, and exchange to Fordenborough, and did deliver to Mackarty, as the broker between the

(*x*) *Rex v. Roberts*, 1 Campb. 399. (*y*) *Levi v. Levi*, 6 C. & P. 239.  
 Lord Ellenborough, C. J. See *Reg. v.* (*z*) *R. v. Lewis*, 11 Cox, C. C. 404.  
 Whitehouse, 6 Cox, C. C. 98. (*a*) *Rex v. Mott*, 2 C. & P. 521.

said Chowne and Fordenborough, for the use of Fordenborough, a certain quantity of hats, of a certain value, for so many hogsheads of the pretended new Portugal wine; and that Mackarty and Fordenborough, on such bartering, &c., affirmed that it was true new Lisbon wine of Portugal, and was the wine of Fordenborough, when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenborough, to the great deceit and damage of the said Chowne, and against the peace, &c. (b) It is observed of this indictment, which was for a cheat at common law, that though it did not charge that the defendants *conspired eo nomine*, yet it charged that they together, &c., did the acts imputed to them, which might be considered to be tantamount. (c) The case was considered as one of doubt and difficulty, but it seems that judgment was ultimately given for the crown, on the ground that the offence was conspiracy. (d)

A count alleged that the prisoners unlawfully did conspire by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to win from A. Rhodes the sum of 2*l.* 10*s.* of his money, and unlawfully to cheat him of the same; the prisoners and Rhodes were in a public house, and, in concert with the other two prisoners, J. Dewhurst placed a pen-case on the table, and left the room to get writing-paper. Whilst he was absent the other prisoners, Hudson and Smith, were alone with Rhodes, and Hudson took up the pen-case, and took the pen from it, placing a pin in the place of it, and put the pen he had taken out under the bottom of Rhodes' drinking-glass, and Hudson then proposed to Rhodes to bet Dewhurst, when he returned, that there was no pen in the pen-case. Rhodes was induced by Hudson and Smith to stake fifty shillings in a bet with Dewhurst that there was no pen in the pen-case, which money Rhodes placed on the table, and Hudson snatched up to hold. The pen-case was then turned up into Rhodes' hand, and another pen with the pin fell into his hand, and then the prisoners took his money. It was contended, on a case reserved, that this was a mere deceit not concerning the public, and that there was no false pretence on which any of the prisoners could have been convicted of obtaining money by false pretences. The prosecutor intended to cheat Dewhurst, and was a party to the fraud, and could not maintain this indictment. Pollock, C. B., 'We are all of opinion that the conviction is good. The expression "by false pretences" used in the count is not to be construed in the technical sense contended for by the counsel for the prisoners. We think that there was abundant evidence of a conspiracy to cheat. Though it be an ingredient in that conspiracy to induce the man who is cheated to think that he is cheating some one else, that does not prevent those who use that device from being amenable to punishment.' (e)

Conspiracy to cheat by a fraudulent wager.

Where a woman, living in the service of her master, conspired Conspiracy to

(b) Reg. v. Mackarty, 2 Lord Raym. 1179. 2 East, P. C. c. 18, s. 5, p. 823.

(c) 2 East, P. C. c. 18, s. 5, p. 824.

(d) 2 East, *ibid.* And see vol. 2, p. 519.

(e) Reg. v. Hudson, Bell, C. C. 263. Channell, B., 'If the count had omitted the words "by false pretences," it would

have been good.' Blackburn, J., 'If proof was given of an agreement by fraudulent devices to obtain the money, which is the substance of the third count, is there not evidence for the jury?' See the case on another point, vol. 1, p. 610.

solemnize a marriage.

with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction was founded on that ground. And it was considered in this case that, though no actual injury was proved, yet it was the province of the jury to collect, from all the circumstances of the case, whether there was not an intention to do a future injury to the person whose name was assumed. (*f*)

Conspiracy to procure a marriage with a minor by a license obtained by a false oath.

And a conviction has taken place upon an indictment, which charged that M. A. Wrench was a person of ill-fame and bad character, and a common prostitute, and that W. B. Serjeant was an infant within the age of 21 years, and that M. A. W. and P. D. and S. J., intending to defraud the said W. B. S. of his property, conspired for the purpose aforesaid to procure a marriage to be solemnized between the said W. B. S. and the said M. A. W., by means of a false oath to be taken by the said M. A. W., and by divers false pretences, and without the consent of the mother of the said W. B. S., his father being dead, and that the said M. A. W. and P. D. and S. J., in pursuance of the said conspiracy, did prevail on the said W. B. S. to consent to marry the said M. A. W., and by means of such persuasion, and by means of a false oath taken by the said M. A. W., in order to obtain a license for the solemnization of marriage between the said W. B. S. and the said M. A. W., did cause the said W. B. S. to marry the said M. A. W., and a marriage by such license was accordingly solemnized between them, without the leave of the mother of the said W. B. S., who then was such infant as aforesaid. (*g*)

Conspiracy to seduce a young woman.

The seduction of a young woman may be attended with such circumstances as to be indictable as a conspiracy. A case is reported where Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley (she being under the custody, &c., of her father), and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him; and, further, the defendants were charged, that in prosecution of such conspiracy, they took away the Lady Henrietta at night from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady and to the evil example, &c. The defendants were found guilty, though there was no proof of any force, but, on the contrary, it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shown that

(*f*) *Rex v. Taylor*, 1 Leach, 37. 2 East, P. C. c. 20, s. 6, p. 1010. See *Wade v. Broughton*, 3 Ves. & B. 172, that persons conspiring to procure the marriage of a female

fortune may be indicted for a conspiracy.

(*g*) *Rex v. Serjeant, R. & M. N. P. R.* 352.

any artifice was used to prevail on her to leave her father's house ; but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control. (*h*)

A count charged that the prisoners did between themselves conspire, combine, confederate, and agree together knowingly and designedly to procure, by false representations, false pretences, and other fraudulent means, J. C., a poor child, under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man whose name is to the jurors unknown, and, upon a case reserved, the judges were unanimously of opinion that this count charged an indictable offence at common law. (*i*)

A count alleged that the prisoners unlawfully conspired, &c., to solicit, persuade and procure, and in pursuance of the said conspiracy did unlawfully solicit, incite, and endeavour to procure L. M., an unmarried girl, within the age of eighteen years, to become and be a common prostitute, and to commit whoredom and fornication for lucre and gain with men ; and it was urged, in arrest of judgment, that the count was bad, as it did not aver that the girl was chaste ; the fact of a loose woman committing fornication was not punishable by law ; but it was held that the count was good, as it charged a conspiracy to bring about an illegal condition of things. (*j*)

An indictment has been held to lie against several persons for conspiring to carry away a young female under the age of twenty-one from the custody of her parents and instructors, and afterwards to marry her to one of the offenders, contrary to the provisions of the 4 & 5 Ph. & M. c. 8, ss. 3 & 4, and also for conspiring to commit the capital felony (under the 3 Hen. 7, c. 2, s. 1) of taking away an heiress against her will, and afterwards marrying her to one of the defendants. The young lady, who was the heiress of a gentleman of large fortune, and was only fifteen years of age, had been placed under the care of some ladies at Liverpool, for the purpose of finishing her education, and was induced to leave their house by means of a fictitious letter, fabricated by the defendants, who conveyed her to Gretna Green, where she was induced by means of false representations to go through the ceremony of a Scotch marriage, and to consent to become the wife of one of the defendants : and the defendants were convicted. (*k*)

A case is reported where several persons were convicted on an indictment which charged them with conspiring to impoverish one H. B., a tailor, and to prevent him, by indirect means, from

A conspiracy to procure a girl to have illicit connection with a man.

Conspiracy to carry away and marry a female under the age of twenty-one, without the consent of her parents.

Conspiracy to impoverish a man in his trade.

(*h*) *Rex v. Lord Grey*, 3 St. Tri. 519. 1 East, P. C. c. 11, s. 10, p. 460. See also *Rex v. Delaval*, 3 Burr. 1434.

(*i*) *Reg. v. Mears*, 2 Den. C. C. 79. The indictment also contained two counts framed to charge an attempt to commit the offence created by the 12 & 13 Vict. c. 76 ; but no opinion was expressed as to these counts. See vol. 1, p. 877.

(*j*) *Reg. v. Howell*, 4 F. & F. 160,

*Bramwell, B.*, and the Recorder.

(*k*) *Rex v. Wakefield*, 2 Lew. 1. The marriage being in Scotland, an indictment for felony under the 3 Hen. 7, c. 2, s. 1, could not have been supported, and there was no evidence to support an indictment under the 4 & 5 Ph. & M. c. 8, s. 4. See vol. 1, p. 885. An indictment was preferred upon the 4 & 5 Ph. & M. c. 8, s. 3, but no judgment given upon it.

carrying on his trade. (*l*) This, however, appears to have been considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. (*m*)

Conspiracy to cheat creditors.

If traders conspire to defeat their creditors by disposing of their goods in contemplation of bankruptcy, they are guilty of a conspiracy at common law. (*n*)

Bankers publishing false balance sheets.

So if bankers combine to deceive and defraud their shareholders by publishing false balance sheets, they are indictable for a conspiracy. (*o*)

Conspiracy to cheat by false statements of the profits of a trade.

Where the prisoners were indicted for a conspiracy to cheat one Edwards, and the case was that the prisoners had made false representations as to the amount of profits of a business carried on by one of them, and thereby induced Edwards to enter into partnership with one of them; it was held, that they were liable to be indicted for the conspiracy, although no action might lie for the false representation, as it was not in writing, so as to satisfy the 9 Geo. 4, c. 14, s. 16. (*p*)

An indictment was once held not to lie for conspiring to commit a civil trespass.

An indictment will not lie for conspiring to commit a civil trespass upon property, by agreeing to go, and by going into, a preserve for hares, the property of another, for the purpose of snaring them, though it be alleged to be done in the night-time, and that the defendants were armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend or obstruct them. And Lord Ellenborough, C. J., in pronouncing the judgment of the court, said, 'I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment.' (*q*) It may be observed that it was not stated in the indictment that the weapons were *dangerous*, nor that the defendants conspired to go, &c., *with strong hand*.

But this case is overruled.

But this case is overruled by *Reg. v. Rowlands*, (*r*) where Lord Campbell, C. J., said, 'I have no doubt whatever that it was wrongly decided. Going into the prosecutor's close against his will, armed with offensive weapons for the purpose of opposing any persons who should endeavour to apprehend, obstruct, or prevent them, would in itself be an indictable offence; and conspiring to commit such an offence must be an indictable conspiracy.'

An indictment will lie for a conspiracy to

It is now settled that persons may be guilty of a conspiracy to defraud another in the fraudulent sale of a horse. Thus where the

(*l*) *Rex v. Eccles*, 1 Leach, 274.

(*m*) By Lord Ellenborough, C. J., in *Rex v. Turner*, 13 East, 228. See per Lord Campbell, C. J., *Reg. v. Rowlands*, 17 Q. B. 671.

(*n*) *Reg. v. Hall*, 1 F. & F. 33, Watson, B.

(*o*) *Reg. v. Esdaile*, 1 F. & F. 213.

(*p*) *Reg. v. Timothy*, 1 F. & F. 39, Channell, B.

(*q*) *Rex v. Turner*, 13 East, 228, 231. But *qu.* as to that which is reported in this case (p. 230) to have been said by Lord Ellenborough in the course of the

argument, viz. that '*all* the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity.' The facts stated in this case would constitute an offence within the 9 Geo. 4, c. 69, vol. 1, p. 621, and it is conceived that a conspiracy to commit an offence within that statute would be indictable, although not carried into effect. See *Rex v. Wakefield*, *supra*. See also the observations on this case in Deac. Game L. 175. C. S. G.

(*r*) 17 Q. B. 671.

defendants conspired to make a false representation that horses were the property of a private person and not of a horse dealer, and were quiet to ride and drive, and thereby induced a gentleman to buy them at a large price, they were held to have been rightly convicted on a count which charged them with conspiring by false pretences and subtle means to cheat the gentleman of his money. (s)

cheat in the sale of a horse.

An indictment against Brown and Carlisle for conspiracy alleged that one Sibson sold to Brown a mare for 39*l.*, and that the prisoners, whilst the said sum was unpaid, conspired by false and fraudulent representations that the said mare was unsound of her wind, and that she had been examined by a veterinary surgeon, who had pronounced her a roarer, and that Brown had sold her for 27*l.* to induce Sibson to receive a much less sum in payment for the said mare than Brown had agreed to pay Sibson for the same, and thereby to cheat Sibson of a large part of the said sum agreed to be paid for the said mare. The mare had been sold by Sibson to Brown for the price as alleged, and Sibson had agreed to trust Brown for the price till after a fair. The prisoners afterwards conspired to send a false account of the mare to Sibson, and thereby to get him to forego part of the agreed price; and, in pursuance of this conspiracy, they sent a letter to Sibson, stating that the mare was unsound of her wind and had been examined by a veterinary surgeon, and he had pronounced her a roarer. In consequence of this letter Sibson saw Carlisle, who stated that he had examined the mare and that she was unsound, which he knew to be false. Sibson afterwards saw Brown, who told him that he had sold the mare for 27*l.* only (which was false), and persuaded him to receive that sum in satisfaction of his claim, but no receipt or other discharge was given. It was contended that no indictable offence had been proved or charged; for that the facts proved and alleged did not and could not alter the position of Sibson, as the payment of a smaller sum was no satisfaction of the larger sum, for which he had sold the mare, and he might afterwards enforce the payment of the residue. But, upon a case reserved, it was held that the indictment was sustainable, and that the facts given in evidence did sustain it. The substance of the charge is that the prisoners conspired to use unlawful means, namely, false representations, to induce the prosecutor to forego a part of his claim; and there is no force in the argument that, because the prisoners did not by means of their false representations alter the right of the prosecutor to his full claim, the indictment is not sustainable; since in no case where a change is made in the possession of a chattel through a fraud is the property altered. It is not necessary that the fraud should be successful. The offence here charged and proved comes within the legal definition of a conspiracy. (t)

A conspiracy to defraud of part of the price of a horse by falsely pretending that it was unsound.

An indictment cannot be supported for a conspiracy to deprive a man of the office of secretary to an illegal unincorporated trading company. Lord Ellenborough, C. J., said that the society being certainly illegal, to deprive an individual of an office in it could not be treated as an injury: and that when the prosecutor was

An indictment will not lie for conspiring to deprive a man of the office of secretary to an illegal

(s) *Reg. v. Kenrick*, 5 Q. B. 49. See this case, *ante*, vol. 2, p. 557.

(t) *Reg. v. Carlisle*, Dears. C. C. 337; *Reg. v. Read*, 6 Cox, C. C. 134.

trading company.

Conspiracy to sink a foreign ship.

secretary to the society, instead of having an interest which the law would protect, he was guilty of a crime. (*u*)

The prisoner, a foreigner, was indicted for conspiring at Ramsgate with the owner, the master, and the mate of a ship, to cast away the ship, with intent to prejudice the underwriters. The ship was a Prussian merchant vessel, named the *Alma*, and arrived at Ramsgate, and afterwards sailed thence, and she was in six days' time scuttled and sunk by the prisoner and others. The prisoner was apprehended, and made statements implicating himself, the captain, and the mate. He said that the mate had said in Ramsgate that the ship would never reach her place of destination, and spoke of the making away of the ship in an unlawful manner; and when the prisoner said, 'Then we had better sink her here at once on the bar,' the mate replied that was too close to land to make away with the ship in an unlawful manner, or to sink her. Martin, B., told the jury, 'The ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal by our law. And this case does not raise the point which arose in *Reg. v. Bernard*, 1 F. & F. 240, as to a conspiracy limited to a criminal offence to be committed abroad. For here, if the prisoner was party to the conspiracy at all, it was not so limited; for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be within the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad. . . . The question is, was it agreed by and between the prisoner and any other person at Ramsgate that the ship should be destroyed, whether at sea or in port?' (*v*)

Conspiracy by one partner to defraud another.

A partnership, consisting of the prisoner and L. carried on business abroad. The prisoner gave notice under the articles of partnership to dissolve the partnership. An account of the partnership property had to be taken on the dissolution, and upon such account, after payment of partnership liabilities, the partnership assets were to be divided between the prisoner and L. The prisoner agreed with W. and P. to forge documents, and to make false entries in the partnership books and accounts, so as to make it appear that debts existed and were owing which did not exist, so as to reduce the amount devisable between the partners on the dissolution, with intent to cheat and defraud L. Held, that the prisoner was rightly convicted of conspiring with W. and P. to defraud L. (*w*)

Complaint that members of House of Lords had conspired to deceive the House.

Where complaint was made before a magistrate that certain members of the House of Lords had conspired to deceive the House by stating that a charge of falsehood contained in a petition presented to the House was false, though they knew it to be true, in order to prevent the prayer of the petition from being granted, to the injury of the petitioner:—Held, that the complaint did not charge an indictable offence, as an agreement by members of either

(*u*) *Rex v. Stratton*, *cor.* Lord Ellenborough, C. J., 1 Campb. 549, in the notes. See *Reg. v. Hunt*, 8 C. & P. 642, vol. 2, p. 366.

(*v*) *Reg. v. Kohn*, 4 F. & F. 68.

(*w*) *R. v. Warburton*, 40 L. J. M. C.



House to make defamatory speeches there could not be the subject of an indictment. (x)

The Trade Union Act, 1871, and the Act amending the law of conspiracy in trade disputes are noticed *post*, p. 159.

We have seen that from the nature of conspiracy it is an offence which cannot be charged as having been committed by one person only. (y) And upon this ground it has been holden that no prosecution for a conspiracy can be maintained against a husband and wife only, because they are esteemed but one person in law, and presumed to have but one will. (z) But husband, wife, and another may be convicted of a conspiracy. (a) So if all the defendants who are prosecuted for a conspiracy be acquitted but one, and the conspiracy be not stated as having been had with persons unknown, the acquittal of the rest is the acquittal of that one also. (b) But if two persons be indicted for a conspiracy, and one only of them appear and take his trial, he may be found guilty, though the other defendant be absent, and has not pleaded; (c) and this, although the other conspirator named in the indictment was dead before the indictment was preferred, (d) or after pleading not guilty. (e)

All the counts of an indictment alleged that Thompson, Tillotson, and Maddock conspired, &c., 'with divers other persons to the jurors aforesaid unknown;' the jury stated their opinion, upon the evidence, to be that Thompson had conspired with either Tillotson or Maddock, but that they did not know with which. No evidence was given of participation by any other party; and thereon the judge directed a verdict of not guilty, as to Tillotson and Maddock, and a verdict of guilty as to Thompson; and it was held that as Tillotson and Maddock had been acquitted, the verdict could not be supported against Thompson. (f)

Combinations amongst journeymen, workmen, &c.

More than one person must have conspired.

A verdict finding two not guilty and that the third conspired with one of the others, but with which the jury could not say.

(x) *Ex parte Wason*, 38 L. J. Q. B. 302.

(y) *Ante*, p. 109.

(z) 1 Hawk. P. C. c. 72, s. 8.

(a) *Reg. v. Whitehouse*, 6 Cox, C. C. 38, Platt, B.

(b) 1 Hawk. P. C. c. 72, s. 8. 3 Chit. Crim. L. 1141.

(c) *Rex v. Kinnarsley*, 1 Str. 193.

(d) *Rex v. Nicholls*, 2 Str. 1227. But see the case better reported in 13 East, 412, in the notes.

(e) *Reg. v. Kenrick*, 5 Q. B. 49.

(f) *Reg. v. Thompson*, 16 Q. B. 832. Erle, J., *dissentiente*. Lord Campbell, C. J., Patteson, J., and Coleridge, J., rested the decision on the ground that 'other persons' must mean persons other than Tillotson and Maddock; and that the acquittal of those defendants, therefore, must have the same effect as if Thompson, Tillotson, and Maddock had alone been charged with the conspiracy; in which case it was clear Thompson must have been acquitted: and Patteson, J., said, 'I cannot see how Thompson can be convicted of conspiring with persons unknown; upon the evidence he conspired, if at all, with Tillotson or Maddock.' Erle, J., was of opinion that, 'according to the rules of

pleading, this charge, as to each individual, must be construed as if he were charged solely, and it follows that the acquittal of the two becomes immaterial; and the verdict may be found in any terms comprised in the indictment. The finding may be that Thompson conspired with Tillotson, or with Maddock, or with other persons unknown; and so there may be similar findings as to the others. Therefore if any one be found guilty, the verdict must stand as against him; the judge must take the opinion of the jury as to each, whatever be the finding as to the others. "Are you of opinion that Thompson conspired with Tillotson?" "No." "With Maddock?" "No. But we are satisfied that he conspired with some one; we do not know whom." The conspiracy, then, cannot be truly predicated of either Tillotson or Maddock, because the jury do not know which of these two was the conspirator; they do, however, know that one of them was; so that against Thompson, the verdict should be that he conspired with some one, it is not known with whom.' This decision deserves reconsideration. It is a fallacy to suppose that the expression 'a person to the jurors unknown,' means a person absolutely unknown: it merely

Judgment passed on one defendant before the trial of another defendant.

Where to an indictment against four for a conspiracy, two pleaded not guilty; one pleaded in abatement, to which plea there was a demurrer; and the fourth never appeared; and before the argument of the demurrer the record was taken down for trial, and one of the defendants who had pleaded not guilty acquitted, and the other found guilty of conspiracy with him who had pleaded in abatement; and the demurrer was afterwards argued, and judgment of *respondeat ouster* given, whereupon a plea of not guilty was pleaded; the Court of King's Bench held that judgment might be pronounced upon the one that had been found guilty before the trial of the other defendant; for although it was possible that such defendant might be acquitted, yet the court were not warranted in coming to the conclusion that that would be so against the verdict that had been found, or in forbearing to pronounce judgment upon the defendant who had been found guilty. (g) So

means any person whose identity is not sufficiently proved to the satisfaction of the jury; and it cannot be doubted that if Thompson had been charged with conspiring with a person to the jurors unknown, a verdict of guilty ought to have been entered on this finding of the jury. Suppose a count for stealing the coat of A., another the coat of C., and a third of a person unknown, the jury find that the coat belongs to A. or B., but they cannot say which, this is a verdict of guilty on the third count. This indictment was in the form which has been in use for ages in conspiracy and riot, and was originally introduced, and has always been used, for the very purpose of avoiding an acquittal where the evidence might fail to satisfy the jury that any of the persons named were parties to the offence. In *Rex v. Sudbury*, 1 Lord Raym. 484, where two out of four persons charged with a riot had been acquitted, Lord Holt, C. J., said, 'If the indictment had been that the defendants, with divers other disturbers of the peace, &c., had committed this riot and battery, and the verdict had been as in this case, the King might have had judgment.' In *Rex v. Kinnersley*, 1 Str. 193, at p. 195, Reg. v. Herne is cited. There the indictment alleged that Herne with A., *et multis aliis*, did conspire to accuse a man of an offence; the grand jury ignored the bill as to A., but found it as to Herne, who was convicted; and it was moved in arrest of judgment, that there being an *ignoramus* as to A., Herne could not be guilty of conspiring with him; but the whole court held that it was sufficient, it being found that he, *cum multis aliis*, did conspire, and that it might have been laid so at first. See also *Rex v. Scott*, 3 Burr. R. 1262. It is quite an error to suppose that the word 'other,' as used in indictments, means 'different from.' It is a mere word of form, used like 'further' and 'afterwards.' See Reg. v. Downing, 1 Den. C. C. 52. If the indictment had contained three counts, the first alleging a conspiracy between Thompson and Philson, the

second between Thompson and Maddock, and the third between Thompson and divers other persons to the jurors unknown, and the facts had been as in this case, the verdict must have been not guilty on the first two counts, and guilty on the third; and yet each count in this indictment was in point of law exactly the same as such three counts.

The authorities seem to show, that if several persons are indicted for a riot or a conspiracy, and the jury acquit all except two in riot and one in conspiracy, the latter must also be acquitted. It is very confidently submitted that these authorities rest on a fallacy, viz. that because some are acquitted, therefore the others could not have been guilty of the offence together with those that are acquitted. The acquittal of A. necessarily amounts to no more than that A. was not proved to be guilty. Suppose A. and B. are indicted for a conspiracy, and A. has made a written confession that he did conspire with B., and B. with him, but the evidence fails as against B., is A. to be acquitted? Suppose, in such a case, A. had pleaded guilty, is his plea to be set aside because B. for want of evidence is acquitted? This shows that in fact one may be guilty, though the rest are acquitted, and that the doctrine in question rests on an entire fallacy. Again, it is conceived that a still more fatal objection to the doctrine exists. It is apprehended that the acquittal of B. can in no case be admissible in evidence for A. It is obvious that the conviction of A. would not be evidence against B. And the rule is, that 'no record of a conviction or verdict can be given in evidence, but such whereof the benefit may be mutual.' *Rex v. The Warden of the Fleet*, Holt, 133; and see other cases, 2 Phill. Evid. c. 1, s. 1. C. S. G.

(g) *Rex v. Cooke*, 5 B. & C. 538. 7 D. & R. 673. Littleale, J., said, 'If the other defendant shall hereafter be acquitted, perhaps this judgment may be reversed.' *Sed quære* for such acquittal would not necessarily show that the ver-

where three prisoners were indicted in Ireland for the capital offence of conspiring to murder, and, having refused to join in their challenges, one of them was tried alone and convicted; it was held, on a case reserved, that he had been properly tried and convicted, and that there was no ground for respiting or arresting the judgment. (*h*)

With respect to the statement of the charge in the indictment it may be observed, that though it is usual to state the conspiracy, and then show that in pursuance of it certain overt acts were done, it is sufficient to state the conspiring alone. (*i*) And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration. Therefore an indictment for conspiring by divers false pretences and subtle means and devices to get money from J. S., and cheat him thereof, is not objectionable on the ground that it is too general, or does not sufficiently show the *corpus delicti*, or specify any overt act. (*j*) So a count alleging that the defendants 'unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together by divers false pretences and subtle means and devices to obtain and acquire to themselves from one G. W. F. divers large sums of money of the monies of the said G. W. F., and to cheat and defraud him thereof,' has been held good. (*k*) So where a count alleged that the defendants unlawfully, falsely, fraudulently, and deceitfully did conspire, combine, confederate, and agree together, by divers false pretences and indirect means, to cheat and defraud the prosecutor of his monies, the Court of Queen's Bench held that this count was good, on the authority of *Rex v. Gill*, (*l*) which was founded on excellent reason. (*m*) So where a count alleged that the defendants 'unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud' the prosecutor 'of his goods and chattels;' upon error in the Exchequer Chamber it was held that this case was not distinguishable from *Rex v. Gill*, (*n*) and that the count was good. (*o*) But this is only the case where the conspiracy is to commit some offence, and if it be not to commit some offence, the indictment must show some illegal act done in pursuance of the conspiracy, or it is insufficient. (*p*)

A count alleged that C. C. died possessed of certain East India stock, and that the defendants conspired, &c., by divers false, fraudulent, and unlawful ways, means, and contrivances, and by false pretences and false swearing, unlawfully, &c., to obtain the means and power to and for S. P. of transferring and disposing of the said stock; and that in pursuance of the said conspiracy the defendants afterwards caused a certain false deposition, purporting to have been made on oath by S. P. as one of the lawful children

Where it is sufficient to state the conspiring.

Gill's case.

Kenrick's case.

Gompertz's case.

Sydserrf's case.

Where the overt acts must be stated.

A conspiracy to obtain the means and power of transferring stock.

dict of guilty on the former trial was wrong, as witnesses might be dead or absent who were examined on the former trial, or the one defendant might have been convicted on his own confession, which would not be admissible against the other defendant. C. S. G.

(*h*) Reg. v. Ahearne, 6 Cox, 6.

(*i*) Reg. v. Best, 2 Lord Raym. 1167. 1 Salk. 174. 3 Chit. Crim. L. 1143. The Poulterers' Case, 9 Rep. 55. Rex v.

Kimberly, 1 Lev. 62. Rex v. Sterling, 1 Lev. 125.

(*j*) Rex v. Gill, 2 B. & A. 204. See note (*x*), post, p. 131.

(*k*) Reg. v. Kenrick, 5 Q. B. 49.

(*l*) *Supra*.

(*m*) Reg. v. Gompertz, 9 Q. B. 824.

(*n*) *Supra*.

(*o*) Sydserrf v. Reg. 11 Q. B. 245.

(*p*) Rex v. Seward, 1 A. & E. 706.

of the said C. C., wherein S. P. falsely stated that the widow of the said S. P. died without having taken upon her letters of administration of his goods, to be exhibited in the Prerogative Court of Canterbury; and did then fraudulently procure letters of administration to be issued of the goods of C. C. to S. P., as one of the lawful children of C. C. After alleging two other overt acts of a similar kind, the count alleged that the defendants presented such letters of administration to the East India Company, and did, by such false ways, &c., false pretences and false swearing, fraudulently obtain the means and power to and for S. P. of transferring and disposing of the stock; and that S. P. did transfer and dispose of the said stock, &c., with intent to defraud the widow of C. C. It was objected, 1st, that the conspiracy as alleged did not amount to any offence, as no legal meaning could be ascribed to obtaining 'the means and power' of doing an act. 2nd, that the person intended to be defrauded ought to have been shown with more certainty. 3rd, that it ought to have been stated to whom the stock belonged. But the court held that the statement of the means used for effecting the object of the conspiracy were so interwoven with the charge of conspiracy as to show on the face of the count an unlawful conspiracy. But if that were not so, the overt acts showed an indictable misdemeanor. (g)

Indictment  
need not  
allege that the  
prosecutor is  
innocent.

It need not be averred in the indictment that the prosecutor was innocent of the crime imputed to him by the conspirators. (r) And in a case of a conspiracy to charge a person with being the father of a bastard child, it was holden not to be necessary to aver that the prosecutor was not the father, especially when the words of the indictment were 'did *falsely* conspire *falsely* to charge, &c.;' the principle being that innocence must be intended till the contrary appears. (s) And it should seem that even without those words the indictment would be sufficient, and need not state that the charge was false, nor that the child was likely to become chargeable, &c. (t) And an indictment for a conspiracy was holden to be good, although it was not alleged *in the charge itself* that the defendants conspired *falsely* to indict the prosecutor, and although it did not appear of what *particular crime or offence* they conspired to indict him, but only in *general* that the defendants did wickedly and maliciously conspire to indict and prosecute the prosecutor for a crime or offence liable to be capitally punished by the laws of this kingdom. (u) The conspiracy is the gist of the charge alleged in such an indictment.

(g) *Wright v. Reg.* 14 Q. B. 148. This judgment was affirmed on error, *ibid.* 180, on the authority of *Sydserff v. Reg.* *supra*. The indictment contained several other counts, varying the intent to defraud, and omitting some of the overt acts. The seventh count alleged that H. M. C. was entitled to the stock, and that the defendants conspired by false, &c., and unlawful ways and means, and by false pretences unlawfully to obtain the means and power to and for S. P. of transferring and disposing of the said stock. The eleventh count stated that the defendants unlawfully conspired by false, &c., and unlawful pretences, &c.

to obtain and get into their possession of and from one S. B. divers large sums of money with intent to defraud S. B. The Court of Queen's Bench arrested the judgment on these counts.

(r) *Rex v. Kinnersley*, 1 Str. 193.

(s) *Rex v. Best*, 1 Sal. 174. 2 Lord Raym. 1167.

(t) 2 Lord Raym. 1167.

(u) *Rex v. Spragg*, 2 Burr. 993. In *Reg. v. King*, 7 Q. B. 782. Tindal, C. J., said of this case, 'The point decided in that case appears to have been merely this, that, in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet if the rest of the

Where the defendants were indicted for conspiring to pervert the course of justice by producing in evidence a false certificate of a justice of peace, it was holden not to be necessary to set forth in the indictment that the defendants knew at the time of the conspiracy that the contents of the certificate were false, on the ground that if persons with intent to obstruct the course of justice conspire to state a fact at all events as true, which they do not know to be true, it is criminal; and that the defendants were bound to have known that the fact was true which they agreed to certify as such. (v)

Not necessary to state that the defendants knew, &c.

Where the act is in itself illegal, it is not necessary to state the means by which the conspiracy was effected. Thus where the indictment charged that the defendants conspired together by indirect means to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose; Lord Mansfield, C. J., said, 'The conspiracy is stated and its object; it is not necessary that any means should be stated;' and Buller, J., said, 'If there be any objection it is that the indictment states too much; it would have been good certainly if it had not added "by indirect means," and that will not make it bad.' (w) And where the indictment charged that the defendants conspired, by divers false pretences and subtle means and devices to obtain from A. divers large sums of money, and to cheat and defraud him thereof; it was holden that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact, and its object, and not necessary to set out the specific pretences. Bayley, J., said, that when parties had once agreed to cheat a particular person of his monies, although they might not then have fixed on any means for that purpose, the offence of conspiracy was complete. (x) But where the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements, as in the cases which have been cited of conspiracies to marry paupers. (y)

Not necessary to state the means by which the conspiracy was effected, where the thing intended is illegal. *Secus*, where it is legal.

Where an indictment charged the defendants with conspiring 'to defraud J. W. of divers goods, and in pursuance of that conspiracy defrauding him of divers goods, to wit, of the value of 100*l.*;' the Court of King's Bench refused to quash the indictment on motion; for although if this had been an indictment for stealing the prosecutor's goods, it would have been bad for uncertainty, yet in this

Conspiring to defraud J. W. of divers goods.

indictment contains a good charge of a misdemeanor, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without probable cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient; and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common law misdemeanor.

(v) *Rex v. Mawbey*, 6 T. R. 619.

*Ante*, p. 114. Lawrence, J., said that it was not unlike the case of perjury where a man swears to a particular fact without knowing at the time whether the fact be true or false; which is as much perjury as if he knew the fact to be false, and equally indictable. *Ante*, p. 2.

(w) *Eccles's* case in note (d) to *Rex v. Turner*, 13 East, 230. *Ante*, p. 124.

(x) *Rex v. Gill*, 2 B. & A. 204. In *Reg. v. Parker*, 3 Q. B. 292, 11 Law J. N. S. 102, Mag. C., Williams, J., said, 'It has been always thought that in *Rex v. Gill* the extreme of laxity was allowed.'

(y) *Ante*, p. 117. See also *Rex v. Seward*, *ante*, p. 118.

case the gist of the indictment was the conspiracy, and it might be that there was so much uncertainty in the transaction, which was the subject of the indictment, that the allegation could not be made with greater certainty, as the conspiracy might be to defraud the prosecutor, not of any particular goods, but of any goods the prisoner could get hold of. (z)

Indictment for conspiring to injure all who should purchase shares in the funds.

And so where an indictment stated that the defendants conspired by false rumours to raise the funds, with 'intention thereby to injure and aggrieve all the subjects of the King who should on the 21st of February purchase or buy' any shares in the funds; and it was objected that the persons to be affected by the conspiracy were not particularised, as they ought to be, it was held that the indictment was good; for it followed from the nature of the charge that the persons could not be named, because this was a charge of conspiracy on a previous day to raise the funds on a future day, so that it was uncertain who would be the purchasers; and the offence being to raise the funds on a future day, its object was to injure all those who should become purchasers on that day, and not some individuals in particular. (a)

Indictment for conspiring to obtain goods without making payment for them.

So where the first count of an indictment stated that the defendants conspired to defraud 'divers of her Majesty's liege subjects, who should bargain with the defendants for the sale of goods and merchandize of the said subjects' of great value, without making payment or other remuneration or satisfaction for the same, with intent to acquire to the said defendants divers sums of money and other profit and emolument; it was held that it was no valid objection that the count did not state what particular creditors the defendants meant to defraud; for if the offence went no further than the conspiracy, it could not be known what particular persons fell into the snare. But it was further held that the count was defective in not stating with sufficient particularity what the defendants conspired to do. For obtaining goods without making payment was not necessarily a fraud, as the words of the indictment might apply to the obtaining goods to sell on commission. (b)

Indictment for conspiring to obtain goods by a fraudulent deed.

The second count in the same indictment alleged that the defendants being 'indebted to divers persons in large sums of money,' conspired to defraud the said creditors of the defendants of payment of their said debts, and in pursuance of the said conspiracy unlawfully did execute a certain false and fraudulent deed of bargain and sale and assignment of certain fixtures, stock in trade, and goodwill, of great value, belonging to the said defendants, from two of themselves to the third, for divers false and fraudulent considerations, with intent thereby to procure to the said defendants divers sums of money and other emoluments; and it was held that this count was bad for the same reasons as the first; it did not state in what respect the deed was false and fraudulent, and therefore the court had only the prosecutor's general opinion upon this point, not the facts on which it was founded. (c)

(z) Anonymous, 1 Chitty Rep. 698. In Reg. v. Parker, *supra*, it was said that the objection in this case was that the particular goods were not specified, and probably only so much as showed that was stated in the report.

(a) Rex v. De Berenger, 3 M. & S. 68, ante, p. 116.

(b) Reg. v. Peck, 9 A. & E. 686. 1 P. & D. 508.

(c) Reg. v. Peck, *supra*.

Where an indictment alleged that an issue in an action between H. B. and G. C. was tried, and that the plaintiff recovered a verdict for the sum of 17*l.*, and that the judge certified that execution ought to issue forthwith, and that the defendants 'did conspire falsely and fraudulently to cheat and defraud the said H. B. of the fruits and advantages of the said verdict and certificate;' Lord Denman, C. J., held that the indictment was bad, as the allegation was too general, and did not convey any specific idea which the mind could lay hold of, to judge whether any unlawful act had been done or attempted. The terms used did not import in what manner the plaintiff was to be deprived of the fruits and advantages of his verdict, and it was not even alleged that the verdict would lead to any fruits and advantages. (*d*)

Indictment for conspiring to defraud of the fruits of a verdict too general.

So where a count alleged that the defendants conspired 'by divers false, artful, and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve, and impoverish E. W. and T. W., and to cheat and defraud them of their monies;' the Court of King's Bench arrested the judgment on the ground that this count was in too general a form to be supported. (*e*) So where a count charged that the defendants did 'conspire to cheat and defraud the just and lawful creditors' of F.; Lord Tenterden, C. J., thought that the count was much too general, as it did not state what was intended to be done, or the persons to be defrauded, but refused to stop the case on this point, as, if an acquittal were directed, and the count should turn out to be good, the defendants might plead *autrefois acquit*. (*f*)

Too general counts.

An indictment for a conspiracy to obtain goods, which states that the goods were obtained, must state whose property the goods were, or it will be insufficient. The first count alleged that the defendants, intending to cheat and defraud divers of the liege subjects of the Queen of their goods, &c., unlawfully conspired by divers false pretences to obtain from divers of the liege subjects, &c., then carrying on business in the city of London, to wit, T. Tam and D. Law, warehousemen and copartners, and E. Fennell and R. Fennell, cotton yarn manufacturers and copartners, &c., divers goods and merchandise of great value, to wit, &c., and to cheat and defraud the said liege subjects of the said goods and merchandise. The count then set out several overt acts as to the obtaining goods from the parties above named respectively, and concluded by averring that the defendants did by the means aforesaid obtain from the said T. Tam and D. Law, and E. Fennell and R. Fennell, &c., the goods and merchandise aforesaid, and did cheat and defraud them thereof. The second count was similar, but omitted to state the overt acts. The third

An indictment for conspiring to obtain goods and obtaining them held bad for not stating whose property the goods were.

(*d*) *Rex v. Richardson*, 1 M. & Rob. 402.

(*e*) *Rex v. Biers*, 1 A. & E. 327. In *Sydserriff v. Reg.*, 11 Q. B. 245, *ante*, p. 129, Wilde, C. J., in delivering the judgment of the Court of Exchequer Chamber, observed, 'Upon referring to the judgment in *Rex v. Biers*, there seems strong reason to doubt whether it did not go wholly on the one objection to the special counts. Neither *Rex v. Gill*, nor any other authority at all bearing upon the point decided

by it, was referred to in that judgment; and it appears distinctly, from *Reg. v. Gompertz*, 9 Q. B. 824, that *Rex v. Biers* has never been considered by the Queen's Bench as overruling *Rex v. Gill*.' It may therefore be questioned, whether the Court of Exchequer Chamber did not think the count in *Rex v. Biers*, which is set out in the text, to be good.

(*f*) *Rex v. Ferris*, 4 C. & P. 592. The defendants were acquitted.

count stated the conspiracy to be to cause it to be believed that one of the defendants, who was then an uncertificated bankrupt, was not B. P., but J. P., and that he carried on an extensive shipping business, and was a man of large property, and had a large capital in the business, and by means of the said belief to obtain from divers liege subjects (not naming them) divers goods, wares, and merchandise, and to cheat and defraud the said liege subjects of the said goods, &c. The fourth count charged that the defendants unlawfully combined by divers false pretences to obtain from divers liege subjects (not naming them) divers other goods and merchandise of great value, and to cheat and defraud the said liege subjects of the said goods, &c. The defendants having been convicted, a rule was obtained to arrest the judgment for the insufficiency of the indictment in not stating that the goods, &c., which the defendants were charged with conspiring to obtain, were the property of any person, it being consistent with the statement that they were the goods, &c., of the defendants themselves; and the Court of Queen's Bench held that the indictment was bad for not stating to whom the goods belonged. That where the object charged was a conspiracy to obtain from certain persons named divers goods, and to cheat and defraud them of the same, and they were obtained, and the parties defrauded, no precedent was to be found to show that an indictment was good which omitted to state whose the goods were. The first count, therefore, was imperfect, and the objection applied more strongly to the fourth count, where the language was still more general. The conspiracy charged was to obtain divers goods and to cheat and defraud certain persons named, not with intent to cheat and defraud them of the same, though perhaps that would have made no difference, and as there was no statement to whom the goods belonged, the charge did not, of necessity, import any offence, as it was consistent with an attempt by the defendants to obtain by some means their own goods unlawfully detained from them; and to hold that the use of the words 'to cheat and defraud' necessarily implied that the goods belonged to the parties who were stated to be defrauded, would be letting in a generality, which was not shown ever to be allowed. (g)

(g) Reg. v. Parker, 3 Q. B. 292, 11 Law J. N. S. Mag. C. 102. See Reg. v. Bullock, Dears. C. C. 653. S. P. Although there appears at first sight to be some little discrepancy in the cases upon this point, perhaps they are not irreconcilable. The correct distinction to be drawn from them appears to be this, that where there has been merely a conspiracy for a particular purpose (*e. g.* to raise the funds), and such conspiracy has not been carried into execution, an indictment in general terms will be sufficient; but where there has not only been a conspiracy, but such conspiracy has been carried into effect, there the indictment ought to specify precisely what has been effected, as the parties injured, the property obtained, and to whom it belonged. The reason of such a distinction is that in the one case it is impracticable to state with minuteness what never was carried

beyond the intention, whereas in the other case what was actually effected may easily be stated. The case may be compared to the cases of burglary with intent to steal, and burglary accompanied by an actual stealing; in the former it is sufficient to state that the prisoner broke and entered the house with intent to steal the goods (without describing them) of one A. B.; and in the latter the goods stolen must be particularised. So where a conspiracy has been detected before it is carried into execution so far as to ascertain the parties intended to be injured by it, an indictment would be good without naming such parties. Rex v. De Berenger, *ante*, p. 116. But where the conspiracy had proceeded so far as to fix the parties intended to be injured, such parties should be expressly named, and if the object was to defraud them of their goods, or their goods had been ac-



A count alleged that the defendants did unlawfully combine, conspire, confederate, and agree together to cause and procure certain goods, wares, and merchandises, which had been and were theretofore imported into the port of London from parts beyond the seas, and in respect whereof certain duties of customs were due and payable to the Queen, to be taken away from the said port and delivered to the respective owners thereof without payment to the Queen of a great part of the duties of customs so due and payable thereon as aforesaid, with intent to defraud the Queen in her revenue of the customs; it was objected in arrest of judgment that the count was insufficient, because no description of the goods was given, by which the Court could judge whether the goods were liable to duty. But the Court of Queen's Bench held that it was not necessary to specify the goods. It was matter of evidence what the goods were to which the conspiracy related; the parties might have conspired without knowing what they were; they might have laid their heads together to cheat the Queen of whatever customable goods they could pass. (*h*)

A count alleged that W. H. King, E. A. Birch, and A. D. Phillips, did 'unlawfully combine, conspire, confederate and agree together to cheat and defraud certain liege subjects of our Lady the Queen, being tradesmen, of divers large quantities of their goods and chattels:' and that E. A. Birch, in pursuance of the said conspiracy, did fraudulently order and obtain upon credit from W. A. W. and C. W. divers goods and chattels belonging to the said W. A. W. and C. W.; from F. B. and W. J., divers goods and chattels belonging to the said F. B. and W. J.; and from divers other tradesmen whose names are to the jurors unknown, divers other goods and chattels belonging to the said last mentioned persons; and that E. A. Birch, 'in further pursuance of the said conspiracy,' and in order that the said goods might be taken in execution as hereinafter mentioned, did order the said goods to be delivered at her house; and that the said goods were so delivered, and no payment made for the said goods by any of the defendants at any time; and that, 'in further pursuance of the said conspiracy,' the said E. A. Birch did procure the said goods to remain in her house until they were taken in execution as hereinafter mentioned; and that the defendants, 'in further pursuance of the said conspiracy,' did falsely and fraudulently pretend that certain debts were due from the said E. A. B. to the said

A count for conspiring to cause goods, which had been imported, to be delivered without payment of part of the duty, need not describe the goods.

A count, which charges a conspiracy to cheat certain liege subjects of their goods, is bad, as it neither states their names or gives an excuse for not doing so; and it is not aided by a statement of overt acts, which neither in themselves, nor in connection with the statement of the conspiracy, amount to an indictable offence.

tually obtained thereby, the indictment should state in the one case the intent to defraud them of *their* goods, and in the other that they were defrauded of *their* goods. This position has been fully borne out by *Reg. v. King*, *infra*. It may, perhaps, admit of some doubt whether the possibility of the goods belonging to the defendants in the principal case necessarily rendered the indictment bad; for as a party may be guilty of larceny in stealing his own goods, *ante*, vol. 2, p. 240, there seems no reason why parties who conspired to obtain their own goods from another, and thereby to cheat and defraud him, under such circumstances as did not amount to larceny,

should not be indictable for a conspiracy. The better ground to rest the decision upon would seem to be that the indictment did not adopt such a degree of particularity as the facts enabled the prosecutor to do, and the rules of criminal pleading require to be adopted where it is practicable. C. S. G.

(*h*) *Reg. v. Blake*, 6 Q. B. 126. This decision was before *Reg. v. King*, *post*, and all the reasoning in the judgment of the Exchequer Chamber tends to show that this decision was wrong, as the goods had been imported and clearly ascertained. The terms 'a great part of the duties of customs' seem very objectionable.

W. H. K. and A. D. P. respectively, and that the said W. H. K. and A. D. P., 'in further pursuance of the said conspiracy, and in order to obtain payment of such false and fictitious debts,' did commence by collusion with the said E. A. Birch separate actions against the said E. A. Birch. And that afterwards, 'in further pursuance of the said conspiracy,' judgments were collusively signed by the said W. A. K. and A. D. P. in each of the said actions for want of a plea. And that afterwards, 'in further pursuance of the said conspiracy, writs of *fiery facias* were collusively sued out upon the said judgments; by virtue of which writs the said goods were, before the expiration of the said respective times of credit, taken in execution and sold in due course of law to satisfy the fictitious debts falsely and fraudulently alleged to be due from the said E. A. Birch. And so the jurors aforesaid find that the defendants, in manner and by the means aforesaid, unlawfully did cheat and defraud the said W. A. W. and C. W., F. B. and W. J. &c., of their said goods.' The defendants were convicted, and the Court of Queen's Bench held the count good; but the judgment was reversed in the Exchequer Chamber; and Tindal, C. J., in delivering the judgment of the Court, said, 'The charge is that the defendants conspired to cheat and defraud *divers* liege subjects, being tradesmen, of their goods, &c.; and the objection is that these persons should have been designated by their christian and surnames, or an excuse given, such as that their names are to the jurors unknown; because this allegation imports that the intention of the conspirators was to cheat certain definite individuals, who must always be described by name, or a reason given why they are not; and if the conspiracy was to cheat indefinite individuals, as for instance those whom they should afterwards deal with, or afterwards fix upon, it ought to have been described in appropriate terms, showing that the objects of the conspiracy were, at the time of making it, unascertained, as was in fact done in the case of *Rex v. De Berenger*, (i) and *Regina v. Peck*; (j) and it was argued that if, on the trial of this indictment, it had appeared that the intention was not to cheat certain definite individuals, but such as the conspirators should afterwards trade with or select, they would have been entitled to an acquittal; and we all agree in this view of the case, and think that the reasons assigned against the validity of this part of the indictment are correct. But then it was urged on the part of the crown that this defect in the allegation of the conspiracy was cured by referring to the whole of the indictment, the part stating the overt acts as well as that stating the conspiracy; and *Rex v. Spragg* (k) was cited as an authority that the whole ought to be read together. But if we examine the allegations in this indictment, there is no sufficient description of any act done after the conspiracy which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and

(i) 3 M. & S. 67, *ante*, p. 116.(j) 9 A. & E. 686, *ante*, p. 182.(k) 2 Burr. 993. See *ante*, p. 130, note (w), for the remarks on this case.

if it is said that because it is averred to have been done in pursuance of the conspiracy before mentioned, it must be taken to be equivalent to an averment that the conspiracy was to cheat the named individuals of their goods, the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A. in the execution of an ulterior purpose to cheat B. of his goods. And secondly, if the averment is to be taken to be equivalent to one that the goods were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named individuals of their goods, it would still be defective, as not containing a *direct and positive averment* that the defendants did conspire to cheat and defraud those persons, which an indictment for a conspiracy, where the conspiracy is itself the crime, ought certainly to contain. The other allegations of what are termed overt acts are open to the same objection. In none is there complete description of a common law misdemeanor independently of the conspiracy; and the allegation of the conspiracy is insufficient, and not direct and positive. For these reasons the judgment must be reversed.' (l)

Where a count charged that Lewis carried on the business of a dyer, and had divers vats and quantities of dye for the carrying on the business, and that the defendants were employed by Lewis as his servants in the management of his business, and that it was their duty as such servants to employ the vats and dye of Lewis for his benefit and for dyeing such materials as might belong to themselves or be intrusted to them by Lewis for those purposes, and for no other purposes and on no other materials; and that the defendants unlawfully conspired, fraudulently and without the consent of Lewis, to employ the vats and dye in dyeing materials not belonging to themselves and not intrusted to them by Lewis, and to obtain thereby to themselves large profits, and to deprive Lewis of the use and benefit of the said vats and dye; and that the defendants, in pursuance of the said conspiracy, wilfully and without the consent of Lewis, received into their possession divers large quantities of materials, and wilfully and without the consent of Lewis, at his expense and with his said vats and dye, dyed the same materials for their own profit and benefit; it was objected that the count did not show that the goods which the defendants dyed were not their own, and that it appeared by the record that they had permission to dye their own goods; but the Court of Queen's Bench held that the count was good; it was clear that the essential part of the count was the charge of a conspiracy; so that if the evidence proved the conspiracy and did not prove the overt acts alleged, viz. that the conspiracy was carried into effect, the count would have been sufficiently proved. (m)

A count which properly alleges the conspiracy is good, though it may insufficiently allege an overt act.

(l) Reg. v. King, 7 Q. B. 782. In the argument in the Court of Queen's Bench in this case it was also objected that the conspiracy ought to have been laid to defraud divers tradesmen of their goods 'respectively,' but the court held that this

was not necessary, and this point does not appear to have been raised in the Exchequer Chamber.

(m) Reg. v. Burton, 11 Q. B. 929. There was another count similar to the above, which was objected to on the

O'Connell's case. Counts which charge a conspiracy to raise discontent and disaffection amongst the subjects of the Queen, to stir up jealousies, hatred, and ill-will between different classes, are good.

Counts which charge a conspiracy to obtain, by means of intimidation and the exhibition of physical force, a change in the government, are bad.

The first count alleged that the defendants, intending to create discontent and disaffection amongst the subjects of the Queen, and to excite the said subjects to hatred of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to create discontent and disaffection amongst the subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution and to unlawful and seditious opposition to the government and constitution, and to stir up jealousies and ill-will between different classes of her Majesty's subjects, and especially to promote among her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the United Kingdom, and especially in that part called England; and further, to excite discontent and disaffection amongst divers of her Majesty's subjects serving in the army; and further, to cause and procure, &c., divers subjects unlawfully and seditiously to meet and assemble together in large numbers, at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition of great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution; and further, to bring into hatred and disrepute the courts by law established in Ireland for the administration of justice, and to diminish the confidence of the said subjects in Ireland in the administration of the law therein, with the intent to induce the subjects to withdraw the adjudication of their differences from the cognizance of the said courts, and to submit the same to the determination of other tribunals to be constituted for that purpose. The count then alleged various overt acts done in order to excite discontent with, hatred of, and disaffection to the government, laws, and constitution. The second count was exactly like the first, but omitted the overt acts. The third count alleged that the defendants, intending to create discontent and disaffection amongst the subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to raise and create discontent and disaffection amongst the subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution, and to unlawful and seditious opposition to the said government and constitution, and to stir up hatred, jealousies, and ill-will between different classes of the said subjects, and especially to promote amongst the said subjects in Ireland feelings of ill-will and hostility against the said subjects in other parts of the United Kingdom, and especially in that part called England; and further, to excite discontent and disaffection amongst divers subjects serving in her Majesty's army; and further, to cause and procure, &c., divers subjects to meet and assemble together in large numbers at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition of great physical

ground that it did not allege any duty in the defendants not to employ the dye for their own profit; but the court held it good, as the allegation of the conspiracy was sufficient. There was also a question

as to the conspiracy having merged in the felony decided in this case; but as the 14 & 15 Vict. c. 100, s. 12, has got rid of all such questions for the future, it has been omitted.

force at such assemblies and meetings, changes in the government, laws, and constitution; and further, to bring into hatred and disrepute the courts in Ireland for the administration of justice, &c. The fourth count was the same as the third, omitting the charges as to creating discontent in the army, and the diminishing the confidence in the courts of law. The fifth count alleged that the defendants, intending to cause and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, and to unlawful and seditious opposition to the government and constitution, and also to stir up jealousies, hatred, and ill-will between different classes of the said subjects, and especially to promote amongst the said subjects in Ireland feelings of ill-will and hostility against the subjects in the other parts of the United Kingdom, and especially in England. The sixth count alleged that the defendants unlawfully and seditiously intending, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the government, laws, and constitution, unlawfully and seditiously did conspire, &c., to cause, and procure, &c. divers subjects of the Queen to meet and assemble together in large numbers, at various times and at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes in the government, laws, and constitution, &c. The seventh count was like the sixth, with the addition, 'and especially, by the means aforesaid, to bring about and accomplish a dissolution of the legislative union now subsisting between Great Britain and Ireland.' The eighth count charged a conspiracy to bring the tribunals of justice into contempt, and to cause the subjects to withdraw their differences from the said tribunals, and to submit the same to other tribunals. The ninth was similar to the eighth, but substituted for withdrawing their differences, &c., 'to assume and usurp the prerogative of the Crown in the establishment of courts for the administration of the law.' The tenth count charged a conspiracy to bring into disrepute the tribunals for the administration of justice. And the eleventh count alleged that the defendants, intending by means of intimidation and demonstration of physical force, &c., by causing large numbers of persons to meet and assemble in Ireland, and by means of seditious and inflammatory speeches to be delivered to the said persons, and by means of publishing divers unlawful and seditious writings, to intimidate the Lords Spiritual and Temporal and Commons of the Parliament of the United Kingdom, and thereby to effect changes in the laws and constitution, unlawfully and seditiously did conspire, &c., to cause large numbers of persons to meet together in divers places and at divers times in Ireland, and by means of seditious speeches to be made at the said places and times, and by means of publishing to the subjects of the Queen unlawful and seditious writings, &c., to intimidate the Lords Spiritual and Temporal and the Commons of

the Parliament of the United Kingdom, and thereby to effect and bring about changes and alterations in the laws and constitution. Upon a writ of error in the House of Lords, the following question was put to the judges:—‘Are all or any, and if any, which, of the counts in the indictment bad in law? so that if such count or counts stood alone in the indictment, no judgment against the defendants could properly be entered up on them.’ And Tindal, C. J., thus delivered the answer of the judges:—‘My Lords, the answer to the question will depend upon the consideration, whether all the counts of the indictment are framed with that proper and convenient certainty, with respect to the substance of the charge of conspiracy, which the law requires; for, undoubtedly, if any of such counts are framed in so loose, uncertain, or inapt a manner, as that the defendants might have availed themselves of the insufficiency of the indictment upon a demurrer, there is nothing to prevent them from having the same advantage of the objection upon a writ of error. The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent, or even lawful. That it was an offence known to the common law, and not first created by the 33 Edw. 1, st. 2, is manifest. That statute speaks of conspiracy as a term at that time well known to the law, and professes only to be “a definition of conspirators.” It has accordingly always been held to be the law, that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not. (n). No serious objection appears to have been made against the sufficiency of any of the counts prior to the sixth. Indeed there can be no question but that the charges contained in the first five counts do amount, in each, to the legal offence of conspiracy, and are sufficiently described therein. There can be no doubt but that the agreeing of divers persons together to raise discontent and disaffection amongst the liege subjects of the Queen, to stir up jealousies, hatred, and ill-will between different classes of her Majesty’s subjects, and especially to promote amongst her Majesty’s subjects in Ireland feelings of ill-will and hostility towards her Majesty’s subjects in other parts of the United Kingdom, and especially in England—which charges are found in each of the first five counts—do form a distinct and definite charge in each, against the several defendants, of an agreement between them to do an illegal act; and it therefore becomes unnecessary to consider the other additional objects and purposes alleged in some of these counts to have been comprised within the scope of the agreement of the several defendants. With respect, however, to the sixth and seventh counts, we all concur in opinion that they do not state the illegal purpose and design of the agreement entered into between the defendants with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. Each of those two counts does in substance state the agreement of defendants to have been “to cause and

(n) *Reg. v. Best*, 2 Lord Raym. 167, and *Rex v. Edwards*, 8 Mod. R. 320, were here cited.

procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of the realm." Now, though it may be inferred from this statement, that the object of the defendants was probably illegal, yet it does not appear to us to be so alleged with sufficient certainty. The word "intimidation" is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom such fear was intended to operate. But these counts contain no intimation whatever upon what persons this intimidation was intended to operate; it is left in complete uncertainty whether the intimidation was directed against the peaceable inhabitants of the surrounding places, against the subjects of the Queen dwelling in Ireland in general, against persons in the exercise of public authority there, or even against the legislature of the realm. Again, the mere allegation that these changes were to be obtained by the exhibition and demonstration of physical force, without any allegation that such force was to be used, or threatened to be used, seems to us to mean no more than the mere display of numbers, and consequently to carry the matter no further. Applying the same principle and mode of reasoning to the consideration of the eighth, ninth, and tenth counts, we all concur in opinion that the object and purpose of the agreement entered into by the defendants, as disclosed upon these counts, is an agreement for the performance of an act, and the attainment of an object, which is a violation of the laws of the land. We think it unnecessary to state reasons in support of the opinion that an agreement between the defendants to diminish the confidence of her Majesty's subjects in Ireland in the general administration of the law therein, or an agreement to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, are each and every of them agreements to effect purposes in manifest violation of the law. Upon the sufficiency of the eleventh count, no doubt whatever has been raised.' (o)

A count alleged that the defendants, having in their possession two horses, conspired by divers false pretences to obtain large sums of money from such persons as might be desirous of purchasing the said horses, and to cheat and defraud such persons of such sums of money, and that the defendants, in pursuance of the said conspiracy, made certain false pretences, which were set out; and that the defendants, in pursuance of the said conspiracy, did obtain from W. A. an order for the payment of 115*l.* 10*s.* It was objected that this count was bad, because it did not show that W. A. was one of the persons who was desirous of purchasing the horses, and therefore he was not shown to be within the objects of the conspiracy; and the Recorder so held. (p)

Overt act  
unconnected  
with the  
conspiracy.

(o) O'Connell v. Reg. 11 Cl. & F. 155. The Lords all concurred in this judgment.

If this case is correctly reported, the decision is clearly erroneous. The count alleged that the defendants did obtain the money from W. A. 'in pursuance of the

(p) Reg. v. Ward, 1 Cox, C. C. 101.

An indictment for a conspiracy to conceal and embezzle the personal estate of a bankrupt under the 6 G. 4, c. 16 must state the petitioning creditor's debt, the trading, and the act of bankruptcy, and that the party had actually become bankrupt. (g)

Technical averment of conspiracy.

The technical averment of the agreement and conspiracy, generally used in the indictment, charges that the defendants 'did conspire, combine, confederate, and agree together;' but it is said that other words of the same import seem to be equally proper. (r) To the counts for a conspiracy may be joined such other counts as the circumstances of the case may seem to require (not charging a felony), though they do not include a charge of conspiracy. (s)

Place where the offence may be tried.

It has been holden that in an indictment for a conspiracy the venue must be laid where the conspiracy was, and not where the result of such conspiracy was put in execution. (t) But it was said by the court, that there seemed to be no reason why the crime of conspiracy, amounting only to a misdemeanor, might not be tried, wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the King's death, or in conspiring to levy war. (u) And a case was cited in which the trial proceeded upon this principle; and in which, though no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given in Middlesex, where the trial took place, and though the individual actings of some of the conspirators were wholly confined to other counties than Middlesex, yet the conspiracy as against all having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts, done by some of them, in prosecution of the conspiracy in the county where the trial was had. (v)

Jurisdiction of the justices at Quarter Sessions.

The offence of conspiracy might formerly be tried by justices of peace in their Quarter Sessions. In a case where the question of their jurisdiction was raised, no authority being cited either on the one side or on the other, the court decided in favour of their jurisdiction, upon general principles, saying, that a conspiracy was a trespass, and that trespasses were indictable at sessions, though not committed with force and arms. (w) But now by the 5 & 6 Vict. c. 38, s. 1, 'neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of

5 & 6 Vict. c. 38, s. 1.

conspiracy" which is the regular mode of connecting the overt act with the conspiracy, especially where, as in this case, the overt act could not be foreseen at the time when the conspiracy was entered into. The overt act, therefore, was well laid. But even if it had been otherwise, the count was good without it; for the conspiracy was clearly well laid: and, where that is the case, an acquittal of the overt act is immaterial. *Rex v. Sterling*, 1 Lev. 125, shows that the overt act is in such a case immaterial.

(g) *Rex v. Jones*, 4 B. & Ad. 345. 1 N. & M. 78. See vol. 2, p. 452.

(r) 3 Chit. Crim. Law, 1119. See per

Lord Campbell, *Reg. v. Hamp*, *ante*, p. 115.

(s) See the judgment of Lord Ellenborough, C. J., in *Rex v. Johnson*, 3 M. & S. 550. In *Reg. v. Murphy*, 8 C. & P. 297, counts for libel were joined.

(t) *Reg. v. Best*, 1 Salk. 174.

(u) *Rex v. Brisac*, 4 East, R. 171.

(v) *Rex v. Bowes*, cited in *Rex v. Brisac*, *supra*.

(w) *Rex v. Rispal*, 3 Burr. 1320. 1 Black. R. 368. *Burn's Just. tit. Conspiracy*, sec. 1. The point was so decided in an earlier case, *Rex v. Edwards*, 8 Mod. 320.



any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons, for (*inter alia*) unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person.'

A count alleged that the prisoners conspired, by divers false pretences, against the form of the statute in that case made and provided, to defraud the prosecutor of his money; and it was objected that the facts ought to have been set out so as to show that the offence intended to be committed was within the jurisdiction of the sessions, by whom the indictment had been tried; but the Court of Queen's Bench held that the count sufficiently showed that the sessions had jurisdiction. (x)

As to an indictment for conspiracy not being preferred without previous authorization, see vol. 1. p. 2.

On an indictment against the manager and secretary of a joint stock bank, the indictment containing many counts, some charging that the defendants concurred in making and publishing false statements of the affairs of the bank, and others that they conspired together to do so, the prosecutors were put to elect on which set of counts they would rely, and they having elected to rely on the counts for conspiracy, held, that it was not enough to prove that the defendants made and put forth false statements intended and calculated to deceive, unless they had entered into a precedent and fraudulent conspiracy to do so. The chief count relied upon not stating an intent to defraud any particular parties; held, that though there were auditors, whose duty it would be to discover any frauds, that was no answer to the prosecution, if the defendants were party to such conspiracy to deceive them and the directors. But, on the other hand, the jury were told that evidence that the directors were privy to all that was done was very material, with a view to negative such conspiracy, on the part of the defendants, to deceive. (xx)

On a prosecution against several persons for a conspiracy, the wife of one of the defendants has been holden not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (y) And so it has been held, upon an indictment against the wife of W. S. and others for a conspiracy in procuring W. S. to marry, that W. S. was not a competent witness in support of the prosecution. (z) See 38 & 39 Vict. c. 86, s. 11, *post*, p. 163, where a husband or wife is a competent witness under that Act.

An able writer upon the law of evidence lays down the following doctrine with respect to the acts or words of one conspirator being evidence against the others. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original

A count showing jurisdiction in the sessions.

Indictment not to be preferred without previous authorization.

Indictment for publishing false statements of the affairs of a bank.

Wife of one defendant no witness for the others.

How far the acts or words of one conspirator are evidence against the others.

(x) Latham v. Reg. 9 Cox, C. C. 516. Frederick, 2 Str. 1095. 1 Phill. Evid.  
 (xx) R. v. Birch, 4 F. & F. 407. See 74.  
 R. v. Barry, 4 F. & F. 389. (z) Rex v. Serjeant, R. & M. N. P. R.  
 (y) Rex v. Lockyer, 5 Esp. N. P. R. 352. 1 Phill. Evid. 74.  
 107. Lord Ellenborough, C. J. Rex v.

concerted plan, and with reference to the common object, is in the contemplation of law the act of the whole party, and, therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial for the same offence. (a) And, in general, proof of concert and connection must be given, before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. (b) It is for the court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, at the time of doing such an act, is evidence against the others. Thus, where Stone was indicted for treason, and one of the overt acts charged was conspiring with Jackson and others to collect intelligence, and to communicate it to the King's enemies in France, &c., after evidence had been given to connect the prisoner with Jackson in the conspiracy as charged, the secretary of state for the foreign department was called to prove that a letter of Jackson's, containing treasonable information, had been transmitted to him from abroad, but in a confidential way, which made it impossible for him to divulge by whom it was communicated: and such letter was received in evidence. (c) So, in another case, after evidence had been given of a treasonable conspiracy, in which the prisoner was concerned, it was held that papers found in the lodging of a co-conspirator, at a period subsequent to the apprehension of the prisoner, might be read in evidence, upon strong presumptive proof being given that the lodgings had not been entered by any one in the interval between the apprehension of the prisoner and the finding of the papers, and although no absolute proof had been given of their existence previous to the prisoner's apprehension. (d) But it seems that if such papers had not been proved to have been intimately and immediately connected with the objects of the conspiracy, they would not have been admissible; as, in the same case, a paper containing seditious questions and answers, and found in the possession of a co-conspirator, was not read in evidence, the court

Proof of concert before declarations of others admissible.

(a) 1 Phill. on Evid. 94, 95, 7th ed. See 9th ed. 201.

(b) 1 East, P. C. c. 2, s. 37, p. 96. 2 Stark. Evid. 326, and 1 Phill. Evid. 477, citing the Queen's case, 2 Brod. & B. 302. Reg. v. Jacobs, 1 Cox, C. C. 173. Reg. v. Duffield, 5 Cox, C. C. 404. See R. v. Gurney, 11 Cox, C. C. 414, where

defendants were indicted for a conspiracy to cheat and defraud by means of a false prospectus of a public company.

(c) Rex v. Stone, 6 T. R. 527.

(d) Rex v. Watson, 2 Stark. C. 140. R. v. MacCafferty, 10 Cox, C. C. 603; R. v. Meaney, 10 Cox, C. C. 506.

doubting whether it was sufficiently connected by evidence with the object of the conspiracy to render it admissible. (e)

Where, upon an indictment for conspiring to annoy a broker who distrained for church-rates, it was proved that one of the defendants, in the presence of the other, excited the persons assembled at a public meeting to go in a body to the broker's house; it was held that evidence was admissible to show that they did so go, although neither of the defendants went with them, but that evidence of what a person, who was at the meeting, said a few days after the meeting when he himself was distrained for church-rates, was not admissible. (f) And where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a Chartist association, and that Jones was also a member, and that in the evening of the 3rd of November the defendant had been at Jones's house, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others; it was held that a direction given by Jones in the forenoon of the same day to certain parties to meet on the race-course was admissible; and it being further proved that Jones and the persons assembled on the race-course went thence to the New Inn, it was held that what Jones said at the New Inn was admissible, as it was all part of the same transaction. (g)

Declarations and acts in pursuance of the conspiracy.

A number of persons were charged with murder committed by an act done in the course of a conspiracy for the purpose of liberating a prisoner, of which conspiracy he was cognizant: Held, that acts of that prisoner, within the prison, and articles found upon him, were admissible in evidence against the persons so charged. (h)

On an indictment on the 11 & 12 Vict. c. 12, s. 3, which makes it a felony to compass, &c., to deprive the Queen of her crown or to levy war, &c., it appeared that the prisoners from July 26th to August 16th had attended meetings where plans for securing the people's charter and the repeal of the union were organized, and took a prominent part at those meetings: large bodies of men were formed into societies, with class leaders, &c.; some of them were selected and organized as fighting men, and an attempt at insurrection was to be made on the 16th of August; and on that night a great number of the conspirators were found at the several places of meeting previously fixed, provided with arms, &c. A witness stated that at a meeting, at which none of the prisoners were present, he received a leaf of a book from one Bezer, which was to serve as an introduction to a subsequent meeting; and on the 20th of July he attended a second meeting, and produced the leaf; the chairman compared it with a book, and the witness was admitted. The prisoners were not shown to have been parties to the conspiracy at the time. But it was held that the witness might prove what Bezer said to him when

Evidence of meetings and of what took place at them.

(e) *Rex v. Watson, supra.* But they held that if proof were to be given that the instrument was to be used for the purposes of the conspiracy, it would clearly be admissible.

*Coleridge, J.*

(g) *Reg. v. Shellard*, 9 C. & P. 277, *Patteson, J.*

(h) *R. v. Desmond and others*, 11 Cox,

(f) *Reg. v. Murphy*, 8 C. & P. 297,

he gave him the leaf, and also what took place at the second meeting, on the ground that the prosecution had a right to go into general evidence of the nature of the combination between the persons assembled, though the prisoners might not be present. (i) And it having been proved that a large number of armed men were found assembled at a public-house on the 16th of August, the time which had been fixed for the general outbreak, but none of these men had been previously connected with the conspiracy, nor did it appear that the house had ever been recognized as a place of meeting; it was held that evidence was admissible of what was done at that public-house; because it appeared that on this day there was to be a collection of armed persons. (j)

Admissibility  
of a handbill.

On an indictment for a conspiracy to prevent workmen from continuing in their service as tinplate-workers, it appeared that the workmen had been holding shop-meetings and discussions, and the prosecutor, a manufacturer, had published a placard offering constant employment to tinplate-workers, and after that a handbill was circulated about the town, and copies of it stuck up in the windows of beer-shops and public-houses, and one of them in the window of a public-house frequented by the tinplate-workers, and another at a public-house at which one Peel, Green, and Winters, alleged conspirators, lodged, and the defendants had been continually into those houses whilst the bill was in the windows. The bill was addressed 'To the members of the several trade societies connected with the National Association of United Trades by the central committee,' and recited that the committee had been called upon for advice by the tinplate-workers of the town to enable them to obtain an established book of prices; and that communications had taken place with the prosecutor about the amount of wages, but that no arrangement could be made with him. The bill was signed by Peel as general secretary, and mentioned Green and Winters as having visited the prosecutor, but did not mention any of the defendants. Erle, J., held that the bill was not admissible as the act of the defendants, either by themselves or as published or recognized by them. 'You may make a handbill evidence against a man, if I may so say, by retrospective light arising from his conduct. If a handbill says that certain things will be done by certain persons, and that handbill is circulated, where those persons probably saw it, and they do the very thing that the handbill indicates they would do, when that is in evidence, I am of opinion that the bill would be admissible against them; but we are not at that stage yet.' (k) But on the trial of another indictment against Rowlands, Green, Peel, Winters, and others, arising out of the same transactions, where, in addition to the evidence in the previous case, it was proved that Rowlands had been at the Swan whilst the bill was exhibited there, and Peel had been seen going in and out, and the bill was in such a situation that he must have seen it; Erle, J., held that it was admissible. 'If it is evidence against any one of

(i) Reg. v. Lacy, 3 Cox, C. C. 517. the point. See post, p. 150.

Platt, B., and Williams, J., who con- (j) Ibid.

sidered Reg. v. Frost, and Rex v. Hunt (k) Reg. v. Duffield, 5 Cox, C. C. expressly in point, and refused to reserve 404.

the defendants, it is admissible.' 'I believe it is admissible against those in respect of whom I draw the inference that they saw it in the window; those in respect of whom it announces any intention. Green and Winters are the two that are named in it. It purports to be an instrument by Peel, and I think there is evidence before me, from which I am of opinion that Peel had seen that instrument, and it is probable, by his not objecting to it, that he permitted his name to be used to that instrument.' 'I am clear that it is evidence as against one of the defendants, it being published in his name, and, according to the evidence, being probably seen by him.' (*l*)

Upon the trial of Blake on an information for a conspiracy with one Tye to pass imported goods without paying the full duty, it appeared that Tye acted as agent for the importer of the goods, and Blake as landing-waiter at the Custom-house, and that it was Tye's duty to make an entry describing the quantity and particulars of the goods necessary to determine the amount of duty. This entry is called the Perfect Entry, which is left at the Custom-house, and the particulars are there copied into the Blue-book, which was delivered to Blake, the landing-water, whose duty was to examine the goods, and, if he found them correspond with the particulars in the Blue-book, to write 'Correct' across the Perfect Entry, whereupon the goods would be delivered to the importer upon payment of the duties so ascertained. The goods were passed to Tye, the duty having been paid on the Perfect Entry made out by Tye, which corresponded with the entry in the Blue-book. It was then proposed to put in Tye's Day-book, and to show by Tye's own entry therein that the quantity of goods was much larger than appeared by the Perfect Entry and Blue-book, and that the importer had been charged the duties by Tye on such larger amount, and had paid them accordingly. It was objected for Blake—Tye not being on his trial—that the entry in Tye's book was not evidence against Blake; but Lord Denman, C. J., admitted the evidence; and the Court of Queen's Bench held, on a motion for a new trial, that the Day-book was evidence of something done in the course of the transaction, and was properly admitted as a step in the proof of the conspiracy. (*m*) Evidence was given, in the same case, to show that a cheque drawn by Tye for a certain sum, and dated after the goods were passed, had been cashed, and the proceeds traced to Blake. It was then proposed to put in evidence the counterfoil of the cheque in Tye's cheque-book, on which was written an account showing that the cheque was drawn for a sum amounting to half the profit arising from transactions, including the alleged fraud on the revenue, as manifested by the several items in that account. To this evidence a similar objection was taken, but Lord Denman, C. J., admitted it. The Court of Queen's Bench, however, held that the evidence ought not to have been admitted. The conspiracy to defraud the customs had been carried into effect before the cheque was drawn; and the writing on the counterfoil was in effect a declaration by Tye for what purpose he had drawn the cheque, and how the money was to be applied.

On an indictment for a conspiracy to pass imported goods without paying the full duty, an entry made by one of the defendants in the course of passing the goods is admissible against the other; but an entry on the counterfoil of a cheque after the conspiracy has been carried out is not so admissible.

(*l*) Reg. v. Rowlands, 5 Cox, C. C. Bench.  
436. It does not appear that this entry was questioned in the Court of Queen's Bench, 6 Q. B. 126.

Now no declaration of Tye could be received in evidence against Blake, which was made in Blake's absence, except it related to the furtherance of the common object; which this did not. (*n*)

Examination  
of one defend-  
ant admitted  
against him-  
self alone.

On an indictment for conspiracy to defraud the shareholders of the British Bank by falsely representing its affairs to be prosperous, the examination of one of the defendants, which had been taken on a petition for winding up the bank after the date of the alleged conspiracy, was tendered in evidence. This examination showed that this defendant was aware of the insolvency of the bank, and alleged that the other directors had the same knowledge. It was objected that this examination was not evidence of any act done in furtherance of the conspiracy; and that it was not admissible until the other defendants were connected with this defendant in the conspiracy. But Lord Campbell, C. J., (after consulting the other judges of the Queen's Bench), said, 'We are all of opinion that the deposition is admissible against this defendant, as tending to show his knowledge before and at the time of his committing the overt act, but not as against the other defendants. Therefore only such parts should be read as refer to the deponent alone.' (*o*)

Proof of the  
conspiracy.

It is not ne-  
cessary to  
prove the  
actual con-  
spiracy, but  
it may be  
inferred from  
the acts of  
the parties.

The evidence in support of an indictment for a conspiracy is generally circumstantial; and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. (*p*) Although the common design is the root of the charge, yet it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, because in many cases of the most clearly established conspiracies there are no means of proving any such thing. (*q*) If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object they were pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. (*r*) It is a mistake to say that a conspiracy must be proved before the acts of the alleged conspirators can be given in evidence. It is competent to prove insulated acts as steps by which the conspiracy itself may be established. (*s*) And in a late case the jury were told that it does not happen once in a thousand times when the offence of conspiracy is tried that anybody comes before the jury to say that he was present at the time when the parties did conspire together, and when they agreed to carry out their unlawful purposes; that species of evidence is hardly ever to be adduced before a jury; but the unlawful conspiracy is to be inferred from the conduct of the parties; and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say

(*n*) Reg. v. Blake, *supra*.

(*o*) Reg. v. Esdaile, 1 F. & F. 213.

(*p*) Rex v. Parsons, 1 Black. R. 392.

(*q*) Per Coleridge, J., Reg. v. Murphy, 8 C. & P. 297. Reg. v. Brittain, 3 Cox,

C. C. 76, per Coltman, J.

(*r*) Per Coleridge, J., Reg. v. Murphy, *supra*.

(*s*) Per Alderson, B., Ford v. Elliott, 4 Exch. R. 78.

whether those persons had not combined together to bring about that end, which their conduct appears so obviously adapted to effectuate. (t) In a case where a husband, wife, and their servants, were indicted for a conspiracy to ruin the trade of the prosecutor, who was the King's card-maker, the evidence against them was, that they had at several times given money to the prosecutor's apprentices to put grease into the paste, which had spoiled the cards; but there was no account given that ever more than one at a time was present, though it was proved they had all given money in their turns; it was objected that this could not be a conspiracy, on the ground that several persons might do the same thing, without having any previous communication with each other. But it was ruled that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. (u) And it appears also to have been considered that if a banker permits a sum of money to be lodged at his house, to be paid over for corruptly procuring an appointment under government, he may be indicted for a conspiracy along with those who are to procure the appointment, and receive the money. (v)

Every person concerned in any of the criminal parts of the transaction alleged as a conspiracy may be found guilty, though there be no evidence that such persons joined in concerting the plan, or that they ever met the others, and though it is probable they never did, and though some of them only join in the latter parts of the transaction, and probably did not know of the matter until some of the prior parts of the transaction were complete. (w) So that if several persons meet from different motives, and then join in effecting one common and illegal object, it is a conspiracy. (x) Where, therefore, upon an information for a conspiracy to ruin Macklin, the actor, in his profession, it was objected that in support of the prosecution evidence should be given of a *previous* meeting of the parties accused for the purpose of confederating to carry their object into execution; Lord Mansfield, C. J., overruled the objection, saying, that if a number of persons met together for different purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character of a third party, it was a conspiracy, and it was not necessary to prove any previous consult or plan among the defendants against the person intended to be injured. (y)

It appears to have been held that upon an indictment for a conspiracy, where, from the nature of the case, it would be difficult to prove the privity of the parties accused, without first proving the existence of a conspiracy, the prosecutor may go into general evidence of its nature, before it is brought home to the defendants. The indictment charged the defendants, who were journeymen shoemakers, with a conspiracy to raise their wages; and evidence was offered on the part of the prosecution of a plan for a combination amongst the journeymen shoemakers, formed and printed several years before, regulating their meetings, subscriptions, and

Persons joining after the conspiracy is formed.

Persons meeting for one purpose afterwards conspiring for another.

General evidence of the nature of the conspiracy.

(t) Per Erle, J., *Reg. v. Duffield*, 5 Coleridge, J. Cox, C. C. 404.

(x) *Rex v. Lee*, 2 Stark. Evid. 324.

(u) *Rex v. Cope*, 1 Str. 144.

(y) *Lee's case*, 2 M'Nally, Evid. 634.

(v) *Rex v. Pollman*, 2 Campb. 233.

(w) *See cited Cases*, Evid. 385. S. P. per

(w) *Rex v. Lord Grey*, 9 St. Tri. 127. *Reg. v. Murphy*, 8 C. & P. 297.

Coleridge, J. *Reg. v. Murphy*, 8 C. & P. 297. See *ante*, p. 110, note (i).

other matters for their mutual government in forwarding their designs. This evidence was objected to by the counsel for the defendant; but Lord Kenyon, C. J., said, that if a general conspiracy existed, general evidence might be given of its nature, and the conduct of its members, so as to implicate men who stood charged with acting upon the terms of it years after those terms had been established, and who might reside at a great distance from the place where the general plan was carried on; and his Lordship, therefore, permitted a person, who was a member of this society, to prove the printed regulations and rules of the society, and that he and others acted under them, in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of such society, and equally concerned; but he observed, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy. (z) And in several important cases, evidence has been first given of a general conspiracy before any proof of the particular part which the accused parties have taken. (a)

Either course  
may be  
adopted.

It has also been held that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held that directions given by one of the party on the day of their meeting as to where they were to go and for what purpose, were admissible, and the case was said to fall within *Rex v. Hunt*, (b) where evidence of drilling at a different place two days before and hissing an obnoxious person was held receivable. (c)

But after such general evidence has been received the parties before the court must be affected for their share of it. And it seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence to prove its existence, although consultations for the purpose, and letters written in prosecution of the design, but not sent, are admissible. (d) It results from the principles already stated, and it has been observed as a conclusion to which they lead, that it seems to make no difference as to the admissibility of the act or declaration of a co-conspirator against the party defendant before the Court, whether such co-conspirator be indicted or not, or tried or not with the defendant. (e) The evidence is admitted on the ground that the act or declaration of one is the act or declaration of both when united in one common design.

Cumulative  
instances of  
fraud per-

Where the indictment charged the defendants with conspiring to cause themselves to be believed persons of large property for

(z) *Rex v. Hammond*, 2 Esp. N. P. R. 718. Lord Kenyon referred to the cases of the state trials in the year 1745, where from the nature of the charge it was necessary to go into evidence of what was going on at Manchester and in France, Scotland, and Ireland, at the same time.

(a) *Lord Stafford's case*, 7 St. Tr. 1218. *Lord W. Russell's case*, 9 St. Tr. 578. *Lord Lovat's case*, 18 St. Tr. 530.

*Hardy's case*, 24 St. Tr. 129. *Horne Tooke's case*, 25 St. Tr. 1.

(b) 3 B. & Ald. 566.

(c) *Reg. v. Frost*, 9 C. & P. 129. *Tindal, C. J., Parke, B., and Williams, J.*

(d) 2 Stark. Evid. 327.

(e) 2 Stark. Evid. 329. See *post*, Evidence, for further points as to the evidence in cases of conspiracy.



the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune; and then a witness was called to prove that at a different time they had made a similar representation to another tradesman. The evidence of this witness was objected to on the ground that it was not competent to the prosecutor to prove various acts of this kind, and that he was bound to select and confine himself to one. But Lord Ellenborough, C. J., said, 'This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence. (f) And, in a similar case, the same course was allowed as to acts done both in and out of the county where the indictment charged the conspiracy to have been. (g)

mitted to be given in evidence.

But where a count alleged that the defendant and others did conspire to defraud J. Donkersley *and others* of certain goods, and that in pursuance of the said conspiracy the defendant did falsely pretend to the said J. D. that he was a merchant of the name of Grantham, carrying on business at Leeds and Huddersfield; and in further prosecution of the said conspiracy, and under colour of a pretended contract with the said J. D. for the purchase of certain cloth of the goods of the said J. D. *and others*, did obtain possession of a large quantity of cloth of the goods of the said J. D. *and others*, from the said J. D., with intent to cheat the said J. D. *and others*, to the great damage of the said J. D. and others; and it appeared that J. D. had partners; and evidence was given to show an intended fraud upon that firm; and it was also proposed to give evidence of attempts made by the defendant to defraud other persons, as well as the firm of J. D. and Co., of their goods: it was objected that the word 'others' must be taken to mean others the partners of J. D.; that where the goods were stated to be the goods of J. D. and others, it could only mean others his partners, and the word could not have one meaning at one part of the count, and another at another part of the same count. The evidence was received; but, upon a case reserved, the judges held the conviction wrong. (h)

In an indictment for conspiring to defraud D. *and others*, which charges the obtaining the goods of D. *and others*, the word *others* means, partners of D., and evidence of attempts to defraud persons not the partners of D. is inadmissible.

In the case of a conspiracy to raise the price of the public funds by false rumours, it was holden that the court will take judicial notice that a war exists between this country and a foreign state, such war having been recognized in different Acts of Parliament; and, therefore, that an allegation to that effect need not be proved. (i)

The court will take judicial notice of a war.

Where an indictment alleged that the defendants conspired falsely to accuse the prosecutor of having feloniously forged a cheque for the payment of 178*l.*, and that in execution of such conspiracy a letter was written by one of the defendants, in which

Upon an indictment for conspiring to accuse of forging a

(f) *Rex v. Roberts*, 1 Campb. 399. *Ante*, p. 120.

(g) *Reg. v. Whitehouse*, MSS. C. S. G. 6 Cox, C. C. 38.

(h) *Reg. v. Steel*, 2 M. C. C. R. 246, C. & M. 337. No ground for the decision is stated, but Lord Abinger said at the close of the argument, 'I think the counsel for the defendant is right in say-

ing that the word "others" must have the same meaning in the earlier part of the count as in the latter part of it; and with respect to the property of the goods, it must mean that they were the goods of J. D. and his partners.'

(i) *Rex v. Donkersley*, 3 M. & S. 67. *Ante*, p. 116.

cheque, held unnecessary to produce the cheque.

he stated that he had been employed to investigate the circumstances attending the forging of a cheque for 178*l.*, and proof was given of the letter, and also of conversations referring in like manner to a cheque, which the defendants charged the prosecutor with having forged, but the cheque itself was not produced; it was objected that the cheque was so incorporated with the evidence, that the prosecutor was not entitled to prove the conversations without producing the cheque, to which they referred, which it appeared from the evidence was in existence, and in the possession of the defendants. Lord Tenterden, C. J., was, however, of opinion that it was not essential to prove the contents of the cheque or to produce it, but that it was enough to take the conversations as they passed. And the Court of King's Bench, upon a rule to show cause why there should not be a new trial, held that it was not necessary to produce the cheque. The whole of the charge against the defendants was founded on the letter set out in the indictment, which was written by one of the defendants upon the application of the other; and they having taken upon themselves to treat as an existing thing a cheque for 178*l.*, it was not necessary, on the part of the prosecutor, to produce it in evidence, even although it appeared that it actually existed. But it might be a fabrication on their part: there might be no such cheque, and then it could not be produced. (*j*)

Evidence of a conspiracy to defraud by representing a person to be in opulent circumstances.

A count alleged that the defendants, a husband, wife, and daughter, being in low and indigent circumstances, conspired to cause the husband to be reputed and believed to be a person of considerable property, and in opulent circumstances, for the purpose and with the intent of cheating and defrauding divers tradesmen who should bargain with them for the sale to the husband of goods, the property of such tradesmen, of great quantities of such goods, without paying for the same. The wife and daughter usually were together, and on some occasions represented that they were in independent circumstances, their income being interest of money coming in monthly, and in others the wife had said her husband was in independent circumstances. These statements were made in the absence of the husband; but it was proved that he either occupied the lodgings which were hired under these representations, or that the goods were delivered at the places where all the defendants lodged. Platt, B., is reported to have held that there was no evidence of any conspiracy to represent the husband as a person of considerable property. (*k*) Another count alleged the conspiracy in the same manner as the preceding, but charged the intent to be to defraud persons who should let the husband lodgings for hire, of divers large sums of money, being the sums agreed to be paid for the hire of such lodgings; and Platt, B., is reported to have held that this count was not supported, as well on the ground on which the preceding count was not supported, as because the object of the defendants was to obtain possession of the lodgings, and to deprive the landlord of the use of the rooms, but not to deprive him of the price, which was only incidental to their occupation. They had no

object in depriving him of the profits of the rooms, apart from their own occupation of them. (l)

Two counts of an indictment charged the defendants with conspiring to obtain from the prosecutor certain bills of exchange accepted by him, amounting to a large sum of money, and to cheat and defraud him of the proceeds of the said bills; other counts charged a conspiracy to defraud the prosecutor of his monies. Evidence was given to show the obtaining of the acceptances, but it appeared that the prosecutor had not parted with any money, and there was no reason to suppose that he intended to take up the acceptances, and it was not shown that the bills which he accepted were ever in his hands, except for the purpose of his writing his acceptances, they having been brought to him complete, except as to his signature. The jury having found the defendants guilty on these counts, the verdict was impeached as unsupported by the evidence, because the charge was of a conspiracy to obtain acceptances from the prosecutor, whereas he proved that the acceptances were ready written, and in possession of the defendants, or some of them, and nothing was sought but his signature; but the Court of Queen's Bench thought that this was substantially the same thing. It was only by the signature of the prosecutor that the bills became complete; and his acceptance when given, being without any consideration, was at the instant his, and in his possession. It was also urged that the entire transaction, as proved by the evidence, was at variance with the indictment, as all parties well knew that the prosecutor had no money, nor could be defrauded of any; and that the real fraud was on the prosecutor's part, to the prejudice of some expected lender of the sums mentioned in the bills, in return for acceptances of no value. But the court held that, though there might be some ground for this imputation on the prosecutor, yet it would not disprove the fraud practised upon him, by inducing him to accept bills without a corresponding advance of cash. Though there was little appearance of solvency in the prosecutor, those who fraudulently induced him to incur the liability must have speculated on some pecuniary advantage from it; and though the money could in such case only have come from his respectable friends, as he had no funds of his own, the money intended to be so procured might well be described for this purpose as his money. (m)

The expression 'false pretences' as used in indictments for conspiracy is not construed in the technical sense in which it is in indictments for obtaining property by false pretences. (n) Where, therefore, a count charged the defendants with a conspiracy by divers subtle means and false pretences to obtain goods, it was held that an actual false pretence need not be proved

A count for conspiring to defraud A. of his acceptances is proved, though the bills are brought ready prepared by the conspirators, and A. only accepts them.

A count for conspiring to defraud A. of his monies may be proved, though A. has no money or apparent means of obtaining any.

Meaning of the expression 'false pretences.'

(l) Reg. v. Whitehouse, 6 Cox, C. C. 38. I was counsel for the crown in this case, and my recollection of it is that the case went to the jury on all the counts. The main question in the case was whether every representation made was the representation of all. The prisoners came to the town together, lived together, and enjoyed the fruits of their

frauds together; but the conspiracy could only be inferred from a great number of isolated acts, in none of which were all of the prisoners engaged. C. S. G.

(m) Reg. v. Gompertz, 9 Q. B. 824.

(n) Reg. v. Hudson, Bell, C. C. 263, ante, p. 121.

under this count, in the same manner as if it had been a count for obtaining property by false pretences. (o)

Obtaining  
railway  
tickets.

Absolon and Clark were indicted for conspiring to defraud a railway company by obtaining excursion tickets not transferable, and selling them to others. Absolon had sold the excursion tickets to Clark at Brighton, and Clark attempted to use them for the purpose of sending back to London some children. It did not appear how Absolon got the tickets; he had others in his possession. Wightman, J., left it to the jury to determine whether the prisoners did concert together that the tickets should be obtained and used for the purpose of defrauding the company. (p)

Evidence of  
loss of profits.

On an indictment for a conspiracy to cause tinplate-workers to leave their employment, it appeared that the prosecutors, in consequence of their workmen leaving their service, had employed Frenchmen; and Erle, J., held that it was not competent to prove how much the firm had lost by these Frenchmen, as the amount of loss by any particular set of workmen was clearly unconnected with the issue whether there was a conspiracy or not; but that the sum total of the loss might be proved; for the very issue in the matter was the intention to obstruct the business, and the result of the operations was a relevant fact as to that. (q)

Record of  
acquittal.

Where one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried. (r)

Divisible  
averment.

Where an indictment charged that the defendant with divers others did conspire to prevent the workmen of one J. G. from continuing to work in a colliery; Patteson, J., held, that a conspiracy to procure the discharge of any of the workmen would support the indictment, which did not necessarily lay the intent as to all the workmen. (s)

Questions in  
favour of the  
defendants.

On an indictment for a conspiracy to induce tinplate-workmen to leave their employment, it appeared that three of the defendants had come down by invitation from the tinplate-workers' association, and had held meetings with the workmen; and Erle, J., allowed a witness for the defence to be asked, 'With reference to hired men and apprentices, persons under contract to their employers, what advice did these defendants give to the men?' and also 'Whether the witness ever heard them either use any intimidating language or threats, or recommend force of any kind?' (t)

Two persons were indicted for felony, in attempting to poison A. B., by administering certain poisonous ingredients, as set forth in the indictment. At the same time, an indictment was found against them for a conspiracy to poison the same individual by the same means. On the trial of the first indictment, the prisoners were acquitted, there being no proof that the ingredients were poisonous. Parke, J., thereupon directed an acquittal for the conspiracy also, there being no other proof of a conspiracy to poison

(o) Reg. v. Whitehouse, 6 Cox, C. C. 38. Platt, B.

(p) Reg. v. Absolon, 1 F. & F. 498.

(q) Reg. v. Rowlands, 5 Cox, C. C. 436. All the counts ended 'to the great damage' of the prosecutors. See note, p. 171.

(r) Rex v. Horne Tooke, 1 Chitty, Burn. 823, *sed quare*. See note, *ante*, p. 127.

(s) Rex v. Bykerdyke, 1 M. & Rob. 179.

(t) Reg. v. Rowlands, 5 Cox, C. C. 436.

than that by which it was attempted to establish the felony, viz., that the ingredients were poisonous. (*u*)

Where an indictment against A., B., C., and D., charged that they conspired together to obtain, 'viz., to the use of them the said A., B., and C., and certain other persons to the jurors unknown,' a sum of money for procuring an appointment under government; and it appeared that D. (although the money was lodged in his hands, to be paid to A. and B. when the appointment was procured), did not know that C. was to have any part of it, or was at all implicated in the transaction; it was holden, that the averment concerning the application of the money was material, though coming under a viz.: and that as to D., the conspiracy was not proved as laid. (*v*)

Averment as to one of the conspirators not proved.

Where an indictment for a conspiracy to procure false witnesses on the trial of an ejectment, at the great sessions for the county of Glamorgan, stated that at the *general* sessions of our Lord the King, holden, &c., an action of ejectment was depending, in which action J. Doe, on the demise of W. Rees and D. Terry, was the plaintiff, and R. Thomas and T. Beavan the defendants, and it appeared that the ejectment was brought on a joint and two several demises of Rees and Terry; it was held, first, that the description of the sessions was erroneous, as it should have been at the great sessions; secondly, that there was a variance between the action described in the indictment and the action proved to have been pending. (*w*)

Variance.

Where the defendants were indicted for a conspiracy to cheat any person whom they should deal with, and the conspiracy proved was to cheat, A., B., and C.; Parke, B., thought the offence different, and directed an acquittal. (*x*)

Variance.

Where an indictment for a conspiracy stated in the inducement that the defendants knew that the parties conspired against were the proprietors of certain licensed stage carriages, and as such proprietors liable to certain penalties, in which the drivers of such carriages should be convicted of any offence committed by the said drivers, against 'a certain Act of Parliament made and passed in the second and third years of the reign of his present Majesty, intituled, &c.' (setting out the title correctly); and that the defendants unlawfully conspired falsely to exhibit a certain information charging, &c., contrary to the form of the statute in such case made and provided; the judgment was arrested, on the ground that a statute cannot be pleaded as made in two years; for in law an Act cannot be made in two years. (*y*)

Misdescription of a statute in an indictment for conspiracy.

Where the counts in an indictment for a conspiracy are framed in a general form, the judge will order the prosecutor to furnish the defendants with a particular of the charges upon which he means to rely, and such particular ought to be so framed as to give the defendants the same information as would be given by a

Particulars of the charges intended to be relied upon.

(*u*) Maudsley's case, 1 Lew. 51.

(*v*) Rex v. Pollman, 2 Campb. 231.

(*w*) Rex v. Thomas, 1 C. & P. 472, Park, J. A. J.

(*x*) Anonymous, mentioned by Reg. v. King, 7 Q. B. 798.

(*y*) Rex v. Biers, 1 A. & E. 327. The

correct statement is 'a certain statute made and passed in a session of Parliament, held in the first and second years of the reign of King William the Third.' Reg. v. Biers, 1 A. & E. 327. Gibbs v. Pike, 8 M. & W. 223. S. P.

special count: but it need not state the specific acts the defendants are charged with having done, or the times or places at which such acts are alleged to have taken place. (z) But where a count alleges overt acts, the Court will not order particulars to be delivered, where there is no affidavit on the part of the defendant that he has no knowledge of the overt acts charged, and does not possess sufficient information to enable him to meet them. (a)

Evidence admitted, though particulars had not been delivered.

In the British Bank case an order had been made on the first day of the trial that particulars of Cameron's debt, which was stated to be 36,000*l.*, should be delivered to him; and it was objected that until the particulars had been given that case could not be gone into. It was answered that Cameron had had access to the accounts for some months; and Lord Campbell, C. J., held that the crown could not be precluded from giving evidence on that part of the case. (b)

Acquittal of some of the defendants.

Upon the trial of an indictment for a conspiracy, the counsel for the prosecution has a right, before opening his case, to have any of the defendants acquitted, in order that he may call them as witnesses, and the counsel for the other defendants has no power of objecting to this being done. (c)

Election.

Where an indictment contained counts for a conspiracy and counts for a libel contained in a hand-bill, and there was no evidence to affect one of the two defendants as to the libel; Coleridge, J., at the close of the case for the prosecution, put the prosecutor to elect upon which charge he would go before the defendants' counsel entered upon the defence. (d)

Conspiring to commit a statutory offence.

As conspiracy is an offence at common law, if parties conspire to commit an offence created by statute, they may be indicted for such conspiracy, although the statute be repealed before the indictment is preferred. (e)

Change of venue.

The Court of King's Bench have refused to change the venue in an indictment for a conspiracy to destroy foxes and other vermin, on the ground that the gentlemen who were likely to serve on the jury to try the indictment were much addicted to fox-hunting. (f)

Point respecting cross-examination where one defendant only calls witnesses.

In one case, a point arose as to the extent to which the counsel for the prosecution in a case of conspiracy might cross-examine a witness, called by only one of several defendants. The indictment was against A., B., and C.; and after the case for the prosecution was closed, C. *only* called a witness, whom he examined as to a conversation between himself and A.; and it was ruled, that the counsel for the prosecution might cross-examine

(z) *Rex v. Hamilton*, 7 C. & P. 448. Little-  
dale, J., after consulting several of  
the other judges. *Reg. v. Rycroft*, 6  
Cox, C. C. 76. *Williams, J., Reg. v.*  
*Probert, Dears. C. C. 32 (a).* In anony-  
mous, 1 Chitty, 698, the Court of King's  
Bench refused to order such particulars  
to be given on motion, but intimated that  
the correct course was to apply to the pro-  
secutor to give some information as to the  
particulars, upon which he meant to rely  
in support of the indictment, and if he  
refused, then an application might be  
made to postpone the trial in order that

the question might be more maturely dis-  
cussed. From which it is to be inferred  
that the motion had been made without  
any previous application for particulars  
to the prosecutor. C. S. G.

(a) *Reg. v. Stapylton*, 8 Cox, C. C.  
69.

(b) *Reg. v. Esdaile*, 1 F. & F. 213.

(c) *Rex v. Rowland, R. & M. N. P. R.*  
401, Abbott, C. J.

(d) *Reg. v. Murphy*, 8 C. & P. 297.

(e) *Reg. v. Thompson*, 16 Q. B. 832;  
*Reg. v. Bunn*, 12 Cox, C. C. 316.

(f) *Rex v. King*, 2 Chitty Rep. 217.

such witness as to any other conversation between A. and C., although the evidence should tend chiefly to criminate A. (*g*)

If upon an indictment for conspiracy, the jury find the defendants guilty of so much of the indictment as amounts to a misdemeanor, the court may pass judgment upon the defendants. The defendants were indicted for conspiring falsely to indict A. B. for keeping a gaming-house, for the purpose of extorting money from the said A. B., and the jury found the defendants guilty of conspiring to indict A. B., for the purpose of extorting money, but not to indict him falsely; and it was held that enough of the indictment was found to enable the court to give judgment; for, in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law; and the jury had found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money, and that is a misdemeanor, whether the charge were or were not false. (*h*)

If the jury convict of so much of a count as amounts to an indictable offence, judgment may be passed on the defendants.

Where a count alleged that the defendants conspired by divers false pretences and subtle means and devices to extort from T. E. a sovereign of his monies, and to cheat him of the same, and the evidence failed to prove any false pretences; it was held that an indictable offence was charged without reference to the false pretences, and therefore it was not necessary to prove the false pretences, but it was sufficient to prove enough to sustain the rest of the count. (*i*)

Proof of part of a count.

Upon an indictment for conspiracy containing eight counts the jury found a verdict of guilty on six of the counts; there was only one conspiracy proved, but the evidence proved the allegations contained in each count: it was objected in arrest of judgment that each count charged a distinct conspiracy, and therefore as many distinct conspiracies were found as there were counts; but the Court of Queen's Bench held that the answer was, that the evidence accorded with and proved the allegations in each count, and the verdict was founded thereon; and if any count were objectionable, it must not be presumed that the defendants would ever receive any sentence in respect of any such count. (*j*)

A verdict of guilty may be given on several counts if the evidence prove them, though only one conspiracy be shown.

Where a count contains only one charge of conspiracy against several defendants, the jury cannot find one of them guilty of more than one charge. Where, therefore, a count charged several defendants with conspiring to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, it was held by the House of Lords that such finding was bad; as it amounted to finding that one defendant was guilty of two conspiracies, though the count charged only one. (*k*) So where a count charged eight defendants with one conspiracy to effect certain objects, a finding that

Several findings on one charge of conspiracy are bad.

(*g*) *Rex v. Kroehl*, 2 Stark, N. P. R. 343.

(*h*) *Rex v. Hollingberry*, 4 B. & C. 329. 6 D. & R. 345.

(*i*) *Reg. v. Yates*, 6 Cox, C. C. 441. *Crompton, J.*, after consulting *Coleridge, J.* See *Reg. v. Hudson*, Bell, C. C. 262.

*ante*, p. 121.

(*j*) *Reg. v. Gompertz*, 9 Q. B. 824. It should have been added that it must not be presumed that the court would do more than impose a sentence for the one offence.

(*k*) *O'Connell v. Reg.* 11 Cl. & F. 155.

three of the defendants are guilty generally, and that five of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, was held to be bad and repugnant; for the finding that three were guilty was a finding that they were guilty of conspiracy with the other five to effect all the objects of the conspiracy; whereas, by the finding as to the five, it appeared that those five were guilty of conspiring to effect only some of those objects. (l)

A general judgment on several counts, some of which are bad, and on others of which the verdict is bad, is erroneous.

Where an indictment contains several counts, one of which is bad, a general judgment for the crown, where the punishment is not fixed by law, is bad; and a bad finding on a good count is no more a warrant for a judgment on that count than a bad count. Where, therefore, an indictment for conspiracy contained some good and some bad counts, and on some of the good counts there were bad findings, and there was a judgment against each defendant that for 'his offences aforesaid' he should be imprisoned for a certain term, it was held by the House of Lords that each count must be considered as charging a separate offence, and that the terms 'his offences aforesaid' must be treated as extending to all the counts on which he had been found guilty; and as some of the counts and some of the findings were bad, the judgment was altogether erroneous. (m)

Punishment.

In former times, persons convicted of a conspiracy at the suit of the King to accuse another person of a capital offence, were liable to receive what was called the *villanous* judgment, that is, to lose their *liberam legem*, whereby they were discredited and disabled as jurors or witnesses; to forfeit their goods and chattels and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their bodies committed to prison. (n) But this judgment was not inflicted upon those who were convicted only of conspiracies of a less aggravated kind, at the suit of the party: and for some time past it appears to have been the better opinion, that the villanous judgment is by long disuse become obsolete, not having been pronounced for some ages; and that the punishment for conspiracies in general is, as in the case of other misdemeanors, by fine, imprisonment, and sureties for the good behaviour at the discretion of the Court. (o)

Hard labour.

By the 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct,

(l) O'Connell v. Reg. 11 Cl. & F. 155.

(m) Ibid.

(n) 1 Hawk. P. C. c. 72, s. 9. 4 Black. Com. 136.

(o) Id. ibid. The pillory was also very commonly a part of the punishment until such punishment was abolished by the 56 Geo. 3, c. 138. See also *ante*, p. 100, note (p). In a case where the defendants were convicted on an information for a conspiracy to take away the character of one Kempe, and accuse him of murder, by pretended conversations and communications with a ghost that answered by knocking and scratching in Cock-lane, &c., they received the following judgment: Richard

Parsons (the father of the child, who was the principal agent in the pretended communication), to stand thrice in the pillory, and be imprisoned two years; Eliz. Parsons, the mother, to be imprisoned one year; Mary Fraser, a servant, who was aiding and assisting, was sent to the house of correction to hard labour for six months; Moore, the curate of the parish, and one James, were discharged on paying the prosecutor 300*l.* and his costs, which were nearly as much more. Brown, who had published a narrative, and one Day, the printer of a newspaper, had previously made their peace with the prosecutor.



prevent, pervert, or defeat the course of public justice, the Court may award imprisonment for any term now warranted by law, and hard labour during the whole or any part of such imprisonment. (p)

We have seen that by the 24 & 25 Vict. c. 100, s. 4, provision is made for the punishment of conspiracies to murder. (q)

In conclusion of this chapter, it may be mentioned, that, after a conviction for a conspiracy, the defendants must be present in Court when a motion is made on their behalf, in arrest of judgment. (r) And also, that upon a motion for a new trial, after such conviction, all the defendants must be present. (s) And it is not a sufficient excuse for absence, that they are in custody on civil process; but if they were in custody on criminal process, the case would be different, for then they might be charged with the conspiracy also. (t) But where an indictment has been removed into the Court of King's Bench, after verdict, but before judgment, and set down for argument, it does not appear to be necessary that the defendants should appear in Court upon the argument, the proceeding being in the nature of a special verdict, and the party not being considered as convicted, until after the Court have determined upon the verdict. (u) A new trial cannot be granted as to one conspirator without granting it as to all who are convicted, though the ground on which the new trial is granted applies only to the one conspirator. (v) But where some are acquitted and some convicted, a new trial may be granted, as to the latter without disturbing the verdict as to the former. (v)

Conspiracies to murder.

All the defendants must be present in court upon a motion in arrest of judgment or for a new trial.

### *The Trade Union Act, 1871, and The Conspiracy and Protection of Property Act, 1875.*

The earlier statutes relating to the combination of workmen were repealed by the 5 Geo. 4, c. 95. This Act was repealed by the 6 Geo. 4, c. 129, and other provisions were enacted in lieu thereof. This Act was amended by subsequent Acts. All these Acts are now repealed by 34 & 35 Vict. c. 32.

By 34 & 35 Vict. c. 31, s. 1, this Act may be cited as "The Trade Union Act, 1871." (w)

Trade Union Act, 1871.

Sec. 2. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise. (x)

Sec. 3. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

Sec. 5. The following Acts, that is to say:—

- (1) The Friendly Societies Acts, 1855 and 1858, and the Acts amending the same; (xx)

(p) See the clause, vol. 1, p. 79.

(q) Vol. 1, p. 906.

(r) Rex v. Spragg, 2 Burr. 929. 1 Black. R. 209.

(s) Rex v. Teal, 11 East, 307. Rex v. Askew, 3 M. & S. 9. Rex v. Lord Cochrane, 3 M. & S. 10.

(t) Rex v. Hollingberry, 4 B. & C.

329. 6 D. & R. 345.

(u) Rex v. Nicholls, 2 Str. 1227.

(v) Reg. v. Gompertz, 9 Q. B. 824.

(w) This Act is amended by 39 & 40 Vict. c. 22.

(x) See R. v. Bunn, 12 Cox, C. C. 316.

(xx) By 39 & 40 Vict. c. 22, s. 2, a trade union, whether registered or un-

- (2) The Industrial and Provident Societies' Act, 1867, and any Act amending the same; and  
 (3) The Companies' Acts, 1862 and 1867,

shall not apply to any trade union, and the registration of any trade union under any of the said Acts shall be void, and the deposit of the rules of any trade union made under the Friendly Societies' Acts, 1855 and 1858, and the Acts amending the same, before the passing of this Act, shall cease to be of any effect. (*y*)

Sec. 6 provides for the registry of trade unions.

Sec. 9. The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorized so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint in any court of law or equity touching or concerning the property, right, or claim to property of the trade union, and shall and may in all cases concerning the real or personal property of such trade union, sue and be sued, plead and be impleaded, in any court of law or equity, in their proper names, without other description than the title of their office; and no such action, suit, prosecution, or complaint shall be discontinued or shall abate by the death or removal from office of such persons or any of them, but the same shall and may be proceeded in by their successor or successors as if such death, resignation, or removal had not taken place; and such successors shall pay or receive the like costs as if the action, suit, prosecution, or complaint had been commenced in their names for the benefit of or to be reimbursed from the funds of such trade union, and the summons to be issued to such trustee or other officer may be served by leaving the same at the registered office of the trade union.

Sec. 18. If any person with intent to mislead or defraud gives to any member of a trade union registered under this Act, or to any person intending or applying to become a member of such trade union, a copy of any rules or of any alterations or amendments of the same other than those respectively which exist for the time being, on the pretence that the same are the existing rules of such trade union, or that there are no other rules of such trade union, or if any person with the intent aforesaid gives a copy of any rules to any person on the pretence that such rules are the rules of a trade union registered under this Act which is not so registered, every person so offending shall be deemed guilty of a misdemeanor.

Sec. 23. In this act (*yy*) the term 'trade union,' means such combination, whether temporary or permanent, for regulating the rela-

registered, which insures or pays money on the death of a child under ten years of age, shall be deemed to be within the provisions of sec. 28 of the Friendly Societies Act, 1875.

(*y*) See *Farrer v. Close*, 38 L. J. M. C. 132; see 38 & 39 Vict. c. 22.

(*yy*) By 39 & 40 Vict. c. 22, s. 16, so much of the above 23rd section as defines the term trade union, except the proviso qualifying such definition, is hereby repealed, and in lieu thereof be it enacted as follows: The term 'trade union'

means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

tions between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade : Provided that this Act shall not affect—

1. Any agreement between partners as to their own business ;
2. Any agreement between an employer and those employed by him as to such employment ;
3. Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft.

By 38 & 39 Vict. c. 86.

Sec. 1. This Act may be cited as the Conspiracy and Protection of Property Act, 1875.

Conspiracy and Protection of Property Act, 1875.

Sec. 2. This Act shall come into operation on the 1st day of September, 1875.

Sec. 3. An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

Amendment of law as to conspiracy in trade disputes.

Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.

A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction and for the commission of which the offender is liable under the statute making the offence punishable to be imprisoned either absolutely or at the discretion of the Court as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.

Sec. 4. Where a person employed by a municipal authority or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously (z) breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town,

Breach of contract by persons employed in supply of gas or water.

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(z) See sec. 15, *post*, p. 165.

place, or part, wholly or to a great extent of their supply of gas or water, he shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds or to be imprisoned for a term not exceeding three months, with or without hard labour.

Every such municipal authority, company, or contractor as is mentioned in this section shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority or company or contractor, a printed copy of this section in some conspicuous place where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable despatch.

If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notice as aforesaid, they or he shall incur on summary conviction a penalty not exceeding five pounds for every day during which such default continues, and every person who unlawfully injures, defaces, or covers up any notice so posted up as aforesaid in pursuance of this Act, shall be liable on summary conviction to a penalty not exceeding forty shillings.

Breach of contract involving injury to persons or property.

Sec. 5. Where any person wilfully and maliciously (a) breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury, he shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Penalty for neglect by master to provide food, clothing, &c., for servant or apprentice.

Sec. 6. Where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he shall on summary conviction be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding six months, with or without hard labour. (b)

Penalty for intimidation or annoyance by violence or otherwise.

Sec. 7. Every person who, with a view to compel (c) any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—

1. Uses violence to or intimidates (d) such other person or his wife or children, or injures his property; or,
2. Persistently follows such other person about from place to place; or,

(a) See sec. 15, *post*, p. 165.

(c) See *R. v. Hibbert*, 13 Cox, C. C.

(b) As to liability of a master to provide food, &c., for servant or apprentice, see vol. 1, pp. 653, 947.

82.

(d) As to the meaning of this word, see *post*, p. 167, *et seq.*

3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,  
 4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place (e); or,  
 5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road,  
 shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour. Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section. (f)

Sec. 8. Where in any Act relating to employers or workmen a pecuniary penalty is imposed in respect of any offence under such Act, and no power is given to reduce such penalty, the justices or court having jurisdiction in respect of such offence may, if they think it just so to do, impose by way of penalty in respect of such offence any sum not less than one fourth of the penalty imposed by such Act.

Reduction of penalties.

Sec. 9. Where a person is accused before a court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly.

Power for offender under this Act to be tried on indictment and not by court of summary jurisdiction.

Sec. 10. Every offence under this Act which is made punishable on conviction by a court of summary jurisdiction or on summary conviction, and every penalty under this Act recoverable on summary conviction, may be prosecuted and recovered in manner provided by the Summary Jurisdiction Act.

Proceedings before court of summary jurisdiction.

Sec. 11. Provided, that upon the hearing and determining of any indictment or information under sections four, five, and six of this Act, the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses. (g)

Regulations as to evidence.

Husbands and wives.

By sec. 12. In England or Ireland, if any party feels aggrieved by any conviction made by a court of summary jurisdiction on determining any information under this Act, the party so aggrieved

Appeal to quarter sessions.

(e) See *R. v. Druitt*, 10 Cox, C. C. 593; *R. v. Hibbert*, *supra*.

(f) See *R. v. Bunn*, 12 Cox, C. C. 316; *R. v. Shepherd*, 11 Cox, C. C. 325.

It is lawful for workmen, peaceably, and in a reasonable and proper manner, to endeavour to persuade other workmen

who have not acted with them, to do so. They must not infringe the provisions of this enactment, see *R. v. Druitt*, 10 Cox, C. C. 593, per Bramwell, B.

(g) As to a husband or wife being incompetent to be a witness for or against each other, see *post*, *Evidence*.

may appeal therefrom, subject to certain conditions and regulations.

General definitions: 'The Summary Jurisdiction Act.'

Sec. 13. In this Act,—

The expression "the Summary Jurisdiction Act" means the 11 & 12 Vict. c. 43, intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders," inclusive of any Acts amending the same; and

'Court of summary jurisdiction.'

The expression "court of summary jurisdiction" means—

- (1.) As respects the city of London, the Lord Mayor or any alderman of the said city sitting at the Mansion House or Guildhall justice room; and
- (2.) As respects any police court division in the Metropolitan police district, any Metropolitan police magistrate sitting at the police court for that division; and
- (3.) As respects any city, town, liberty, borough, place, or district for which a stipendiary magistrate is for the time being acting, such stipendiary magistrate sitting at a police court or other place appointed in that behalf; and
- (4.) Elsewhere, any justice or justices of the peace to whom jurisdiction is given by the Summary Jurisdiction Act: Provided that, as respects any case within the cognizance of such justice or justices as last aforesaid, an information under this Act shall be heard and determined by two or more justices of the peace in petty sessions sitting at some place appointed for holding petty sessions.

Nothing in this section contained shall restrict the jurisdiction of the Lord Mayor or any alderman of the city of London, or of any metropolitan police or stipendiary magistrate, in respect of any act or jurisdiction which may now be done or exercised by him out of court.

Definitions of 'municipal authority' and 'public company.'

Sec. 14. The expression "municipal authority" in this Act means any of the following authorities, that is to say, the Metropolitan Board of Works, the Common Council of the city of London, the Commissioners of Sewers of the city of London, the town council of any borough for the time being subject to the 5 & 6 W. 4, c. 76, intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales," and any Act amending the same, any commissioners, trustees, or other persons invested by any local Act of Parliament with powers of improving, cleansing, lighting, or paving any town, and any local board.

Any municipal authority or company or contractor who has obtained authority by or in pursuance of any general or local Act of Parliament to supply the streets of any city, borough, town, or place, or of any part thereof, with gas, or which is required by or in pursuance of any general or local Act of Parliament to supply water on demand to the inhabitants of any city, borough, town, or place, or any part thereof, shall for the purposes of this Act be deemed to be a municipal authority or company or contractor upon whom is imposed by Act of Parliament the duty of supplying such city, borough, town, or place, or any part thereof, with gas or water.

Sec. 15. The word "maliciously" used in reference to any offence under this Act shall be construed in the same manner as it is required by the 24 & 25 Vict. c. 97, s. 58 (*h*), to be construed in reference to any offence committed under such last-mentioned Act.

Sec. 16. Nothing in this Act shall apply to seamen or to apprentices to the sea service.

Sec. 17. On and after the commencement of this Act, there shall be repealed :—

'Maliciously' in this Act construed as in Malicious Injuries to Property Act.

Saving as to sea service.

Repeal of Acts.

- I. The Act of 34 & 35 Vict. c. 32, intituled "An Act to amend the Criminal Law relating to violence, threats, and molestation;" and
- II. "The Master and Servant Act, 1867," and the enactments specified in the First Schedule to that Act, with certain exceptions.
- III. Also there shall be repealed the following enactments making breaches of contract criminal, and relating to the recovery of wages by summary procedure; (that is to say,)
  - (a.) An Act 5 Eliz. c. 4, intituled "An Act touching dyvers orders for artificers, labourers, servantes of husbandrye, and apprentices;" and
  - (b.) So much of section two of 12 Geo. 1, c. 34, intituled "An Act to prevent unlawful combination of workmen employed in the woollen manufactures, and for better payment of their wages," as relates to departing from service and quitting or returning work before it is finished; and
  - (c.) Section twenty of 5 Geo. 3, c. 51, the title of which begins with the words "An Act for repealing several Laws relating to the manufacture of woollen cloth in the county of York," and ends with the words "for preserving the credit of the said manufacture at the foreign market;" and
  - (d.) An Act, 19 Geo. 3, c. 49, intituled "An Act to prevent abuses in the payment of wages to persons employed in the bone and thread lace manufactory;" and
  - (e.) Sections 18 & 23 of 3 & 4 Vict. c. 91, intituled "An Act for the more effectual prevention of frauds and abuses committed by weavers, sewers, and other persons employed in the linen, hempen, union, cotton, silk, and woollen manufactures in Ireland, and for the better payment of their wages, for one year, and from thence to the end of the next session of Parliament;" and
  - (f.) Section 17 of 6 & 7 Vict. c. 40, the title of which begins with the words "An Act to amend the Laws," and ends with the words "workmen engaged therein;" and
  - (g.) Section 7 of 8 & 9 Vict. c. 128, intituled "An Act to make further regulations respecting the tickets

of work to be delivered to silk weavers in certain cases."

Provided that,—

- (1.) Any order for wages or further sum of compensation in addition to wages made in pursuance of section sixteen of "The Summary Jurisdiction (Ireland) Act, 1851," may be enforced in like manner as if it were an order made by a court of summary jurisdiction in pursuance of the "Employers and Workmen Act, 1875," and not otherwise ; and
- (2.) The repeal enacted by this section shall not affect—
  - (a.) Anything duly done or suffered, or any right or liability acquired or incurred under any enactment hereby repealed ; or
  - (b.) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed ; or
  - (c.) Any investigation, legal proceeding, or remedy in respect of any such right, liability, penalty, forfeiture, or punishment as aforesaid ; and any such investigation, legal proceeding, and remedy may be carried on as if this Act had not passed.

Application to Scotland.

Sec. 18. This Act extends to Scotland, with certain modifications ; and see sections 19 and 20.

Application to Ireland.

Sec. 21. This Act extends to Ireland, with certain modifications.

### *Cases under Repealed Acts.*

It may be useful to refer to the following cases decided under the repealed acts.

If workmen are dissatisfied with their wages they may lawfully meet to determine the rate of wages they will require, and may agree to fix that rate ; but they cannot lawfully interfere with other workmen in the exercise of the same right.

In his charge to the grand jury at the Stafford Special Commission, 1843, Tindal, C. J., said, "The first observation that arises is that if the workmen of the several collieries and manufactories, who complained that the wages which they received were inadequate to the value of their services, had assembled themselves peaceably together for the purpose of consulting upon and determining the rate of wages or prices which the persons present at the meeting should require for their work, and had entered into an agreement amongst themselves for the purpose of fixing such rate, they would have done no more than the law allowed. A combination for that purpose and to that extent (if indeed it can be called by that name) is no more than is recognized as legal by the 6 Geo. 4, c. 129 ; by which statute also exactly the same right of combination, to the same extent and no further, is given to the masters when met together, if they are of opinion the rate of wages is too high. In the case supposed—that is, a dispute between the masters and the workmen as to the proper amount of wages to be given,—it was probably thought by the legislature that if the workmen on the one part refused to work, or the masters on the other refused to employ, as such a state of things could not continue long, it might fairly be expected that the party must ultimately give way, whose pretensions were not founded in



reason and justice—the masters if they offered too little, the workmen if they demanded too much. But, unfortunately for themselves and others, those who were discontented did not rest here. Not satisfied with the exercise of their own right to withhold their own labour, if they were discontented with the price they received for it, they assumed the power of interfering with the right which others possessed, of exercising their discretion upon the same point; and accordingly you will have numerous cases laid before you in which large bodies of dissatisfied workmen interfered by personal violence and by threats and intimidation, to compel others, who were perfectly willing to continue to labour in their callings at the rate of wages then paid, to desist from their work, to leave the mine or manufactory, and against their own will to add themselves to the numbers of the discontented party; than which a more glaring act of tyranny and despotism by one set of men over their fellows cannot be conceived. If there is one right which, beyond all others, the labourer ought to be able to call his own, it is the right of the exertion of his own personal strength and skill, in the full enjoyment of his own free will, altogether unshackled by the control or dictates of his fellow workmen; yet, strange to say, this very right, which the discontented workman claims for himself to the fullest extent, he does, by a blind perversity and unaccountable selfishness, entirely refuse to his fellows, who differ in opinion from himself. It is unnecessary to say, that a course of proceeding so entirely unreasonable in itself, so injurious to society, so detrimental to the interest of trade, and so oppressive against the rights of the poor man, must be a gross and flagrant violation of the law, and must be put down, when the guilt is established, by a proper measure of punishment.' (j)

The defendants were indicted for a conspiracy to impoverish partners in their trade and business as ironfounders, and for a conspiracy to prevent them from taking into their service journeymen and apprentices, &c.; Rolfe, B., told the jury that, 'Those who are to employ labour may meet and say, "We will not give more than such and such a rate, or we will stipulate for such and such number of hours' work; we will make, in short, regulations beneficial to ourselves as employers, and we agree that we will not take any workmen that require more." On the other hand, the workmen may meet and say, "We will not work for less than such and such sums, and if anybody thinks to employ us on low wages we will agree we will not work for them, and we agree to form a fund and support one another until we get them to come to proper terms." That being the law, the market in that, as in all other things, will find its own level, and what the value of that labour is will be found out by there being either a redundancy of hands out of work, or a redundancy of capital seeking for labour; and that is the policy of the law. But if any illegal means be taken, the principle of the common law steps in, and says that if any persons conspire and combine together to effect this illegal object, an object that is of itself illegal, any such conspiracy to

On the one hand masters have a right to agree among themselves what wages they will give and what hours of work they will require; on the other, workmen have a right to agree among themselves what wages they will require; but neither have a right to enforce these objects by illegal means; and if they agree so to do they are guilty of a conspiracy.

It is not illegal for workmen peaceably to try to persuade others to determine not to work unless on certain terms. (*k*)

It is not necessary to prove that actual threats were used; it is sufficient if the language used is such as to convey the impression of intimidation; and in determining that question it is not so much the very words that are to be considered, as whether the fair result of them was to intimidate.

A combination to compel workmen to quit their employment unless another workman was discharged.

effect the illegal object is itself criminal.' And with reference to the expressions used by the defendants, Rolfe, B., said, 'A great deal may be said as to the precise words used; what I think you should consider is not so much the very words, as whether the fair result of it was to intimate to the person to whom it was addressed, that some bodily harm would happen to him if he persevered in his intention of working at the prosecutors', when they only said, "It will be the worse for you" and "You will regret it," and so on. There are no particular words necessary to be used if the fair inference is that which has been taken, that it was to prevent the other party from persevering in the intention of working for the prosecutors, and unquestionably that would bring home the charge of intimidation.' And with respect to persuasion to leave their service, Rolfe, B., said, 'It is doubtless lawful for people to agree among themselves not to work except upon certain terms; that being so, I am not aware of any illegality in their peaceably trying to persuade others to adopt the same view. It is lawful for half a dozen people to agree together and say, "We will not work unless the prosecutors raise our wages." So it is perfectly reasonable to say to a third man, "You had better do that too," if they do not use threats, to deter him from doing it; but it is not necessary to use actual threats, if the language used is such as tends to convey the impression of intimidation.' And the learned Baron afterwards added, 'My opinion is that, if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations complied with in a peaceable way, it was not illegal.' (*l*)

On an indictment for a combination by workmen contrary to the 6 Geo. 4, c. 129, it appeared that the defendants were members of a society called the Philanthropic Society of Coopers. The society had an acting member in every cooper's yard. C. Evans, a member of the society, was working in Mr. Turner's yard; but, with his permission, he did four days' work at the steam mills of other masters, where steam machinery was employed for making casks. When this came to the knowledge of the society, they inflicted a fine of 10*l.*, payable by instalments, on Evans for working in a yard where steam machinery was employed. Evans refused to pay, and the other men in Mr. Turner's yard then left their work, and refused to return whilst Evans was employed. Evans was, in consequence, thrown out of work. Each man who left Turner's yard on account of Evans was paid 9*s.* for his loss of time by the committee. The fine was imposed in accordance with the rules of the society. Lord Campbell, C. J., was of opinion that the Philanthropic Society was, according to its rules, a lawful institution; but it could not be permitted that, under the guise of its laudable objects, the members should enter into a combination to injure others. By law every man's labour was his own, and he might make what bargain he liked for his own employment; but the men must not associate themselves to do that which might pre-

(*k*) See *R. v. Shepherd*, 11 Cox, C. C. 325; *R. v. Hibbert*, 13 Cox, C. C. 82. This is so now, see ss. 2 & 7 of new Act, *ante*, pp. 161, 162.

(*l*) *Reg. v. Selsby*, 5 Cox, C. C. 495, note. Sp. As. 1847. See sec. 7 of the new Act, *ante*, p. 162.

judice another man. The men may take care not to enter into engagements of which they do not approve; but they must not prevent another from doing so. It was clear the defendants unlawfully imposed a fine on Evans, and proceeded by unlawful means to induce him to pay that fine. (m)

The first count stated that R. P. and G. H. P. carried on trade as manufacturers of japanned and tin wares, and that divers persons were workmen, and hired and employed by and worked as workmen for the said R. P. and G. H. P. in their said trade, and that the prisoners unlawfully conspired, &c., by unlawfully molesting the workmen so hired and employed by and working for the said R. P. and G. H. P. in their said trade, to force and endeavour to force the said workmen so hired and employed by and working for the said R. P. and G. H. P., in their said trade, to depart from their said hiring, employment, and work. The second count was like the first, but stated the means to be by unlawfully using threats to the said workmen. The third was like the preceding, but stated the means to be by unlawfully intimidating the said workmen. The fourth, fifth, and sixth were similarly framed for conspiring to force individual workmen to depart from their hiring by the means stated in the first, second, and third counts respectively. The seventh count, like the first, stated that divers persons were workmen, and were hired and employed by and worked for R. P. and G. H. P. in their said trade, and that the prisoners unlawfully conspired, &c., by unlawfully molesting the said R. P. and G. H. P., to force and endeavour to force the said workmen so hired, &c., to depart from their said hiring, &c. The eighth count was like the seventh, but stated the means to be by unlawfully obstructing the said R. P. and G. H. P., so carrying on their said trade, and the said workmen so hired, &c., by and working for the said R. P. and G. H. P. in their said trade. The ninth count stated that R. P. and G. H. P. carried on trade, &c., and that the prisoners unlawfully conspired, &c., by molesting the said R. P. and G. H. P., to force and endeavour to force them to make an alteration in the mode of carrying on their said trade. The tenth count stated that workmen were hired, &c., by R. P. and G. H. P. as in the former counts, and that the prisoners unlawfully conspired by obstructing the said R. P. and G. H. P., and by inducing and persuading the said workmen in the hiring and employment of the said R. P. and G. H. P. to leave their hiring, employment, and work, to force and endeavour to force the said R. P. and G. H. P. to make an alteration in the mode of carrying on their said trade. The eleventh count stated that R. P. and G. H. P. carried on trade, &c., and that divers persons were being hired and employed as workmen for the said R. P. and G. H. P. in their said trade; and that the prisoners unlawfully conspired by molesting and obstructing such workmen as aforesaid as might be willing to be hired and employed by the said R. P. and G. H. P. in their said trade, and who were not then hired and employed by the said R. P. and G. H. P., or by any other person, to prevent and endeavour to prevent the said workmen so willing to be employed, &c., from hiring themselves to, and from accepting work and

Counts for a conspiracy to force workmen to leave their employment by 'molesting,' 'using threats to,' and 'intimidating' them, are good, as they state the means in the terms of the 6 Geo. 4, c. 129, s. 3.

And so are counts for a conspiracy to 'molest' and 'obstruct' an employer.

And so are counts for a conspiracy to force a master to alter the mode of conducting his business by 'molesting' and 'obstructing' him and persuading his workmen to leave his service.

And so are counts for a conspiracy to prevent workmen from hiring themselves by molesting, obstructing, and threatening such workmen.

And so are counts (framed with reference to the 4 Geo. 4, c. 34, s. 3) for a conspiracy to induce workmen to absent themselves from their employment before the end of their hiring.

employment from the said R. P. and G. H. P. in their said trade. The twelfth count was like the eleventh, but stated the means to be by unlawfully using threats and intimidation to such workmen who might be willing, &c. The thirteenth (*n*) count stated that R. P. and G. H. P. carried on trade, &c., and that divers persons, being artificers, had contracted with the said R. P. and G. H. P. to serve them as artificers in their said trade for certain times and periods, &c., and had entered into the service of the said R. P. and G. H. P. as such manufacturers. And that the prisoners unlawfully conspired, &c., by divers subtle means and devices, to induce and persuade such artificers so having contracted, &c., and so having entered into the service, &c., unlawfully to absent themselves from the said service of the said R. P. and G. H. P., without the consent of either of them, before the respective terms of the same contracts were completed. The fourteenth count stated that W. H., being an artificer, had contracted, &c., for a period specified, and had entered into the service, and that the prisoners conspired, &c., by divers subtle means and devices, and illegal acts and practices, and by intoxicating the said W. H., to induce and persuade the said W. H., so having contracted, &c., and so having entered into the said service, &c., unlawfully to absent himself from the service of the said R. P. and G. H. P. without the consent of either of them before the term of the said contract was completed. The fifteenth count was like the fourteenth, but related to one T. G. The eighteenth count stated that the prisoners, intending to injure and oppress the said R. P. and G. H. P. in their trade as manufacturers, &c., conspired, &c., by divers subtle means and devices, and by intoxicating and thereby rendering senseless the workmen of the said R. P. and G. H. P. in their trade, to convey to a distance and carry away the said workmen, and thereby to prevent the said workmen from continuing to work for the said R. P. and G. H. P. in their said trade. The twentieth count stated that the prisoners conspired by divers subtle means and devices, and by illegal acts and practices, and by molesting and intoxicating the workmen in the employment of the said R. P. and G. H. P., and by inducing the workmen to depart from the said employment and to break their contracts with the said R. P. and G. H. P., to force and compel the said R. P. and G. H. P. to alter, and thereby increase, the amount of wages which the said R. P. and G. H. P. then were in the habit of paying to the workmen in their employment. Each count concluded 'to the great damage of the said R. P. and G. H. P.,' &c. In arrest of judgment it was urged that the first ten counts were too vague and the words, 'molest,' 'threats,' 'intimidating,' and 'obstructing,' were objected to as not necessarily importing anything unlawful. To the eleventh and twelfth counts it was further objected that they ought to have alleged that the prisoners knew of the intended hiring, and that the names of the workmen ought to have been stated. That to follow the words of a statute was only sufficient where the indictment was on the statute, and here the charge was at common law. The offences created by the

(*n*) This and the two following counts were framed with reference to the 4 Geo. 4, c. 34, s. 3, which relates to workmen who unlawfully absent themselves from their service before the end of the term for which they have been engaged.

6 Geo. 4, c. 129, s. 3, depended entirely upon the means used, and if those were not properly described, there was no sufficient charge of conspiracy to violate the statute. To the thirteenth, fourteenth, and fifteenth counts it was objected that they ought to have stated what the contracts were, and that the absence was without lawful excuse. That conspiring merely to 'induce and persuade,' as alleged in the tenth count, was no offence, even if a contract appeared which made it unlawful not to serve. But the Court of Queen's Bench held that the counts were wholly unexceptionable. Lord Campbell, C. J., 'It is objected that some counts do not disclose the nature of the molestation or intimidation by which the conspiracy was to take effect; but this is quite unnecessary. The words of the legislature are used; the terms in question have a meaning stamped upon them by the 6 Geo. 4, c. 129, s. 3, and we must take it that they are used here in that sense. And they are not employed, as describing the substantive offence for which the indictment is preferred; that offence consists in the conspiracy, which is a misdemeanor at common law.' (o)

In summing up this case to the jury, Erle, J., said, 'The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand. I say nothing at present as to the legality of other persons not workmen combining with them to assist in that purpose. As far as I know, there is no objection, in point of law, to it; and it is not necessary to go into that matter; but I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit for the parties who combine; a benefit which by law they can claim. I make that remark, because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations, which have for their immediate purpose the hurt of another. The rights of workmen are conceded; but the exercise of free-will and freedom of action within the limits of the law is also secured equally to the masters. The intention of the law is at present to allow either of them to follow the dictates of their own will with

Workmen have a right to combine for their own protection and to obtain such wages as they choose to demand; but they have no right to combine for the purpose of injuring another. Masters may also combine to promote their mutual advantage.

(o) Reg. v. Rowlands, 17 Q. B. 671. 2 Den. C. C. 364. Sum. Ass. 1851. The other objections were not noticed. The sixteenth count stated that the prisoners conspired unlawfully to intimidate, prejudice, and oppress R. P. and G. H. P. in their trade as manufacturers of jappanned and tin wares, and to prevent the workmen of the said R. P. and G. H. P. from continuing to work for them in their said trade. The seventeenth count stated that the prisoners conspired, &c., by divers subtle means and devices, and wicked arts and practices, to injure and oppress the said R. P. and G. H. P. in their trade of manufacturers of tin and jappanned wares, and to induce the workmen of the said R. P. and G. H. P. to depart from their hiring, employment, and work with the said R. P. and G. H. P. before the

period of their agreement with them was completed. The nineteenth count stated that the prisoners conspired, &c., unlawfully to intimidate, prejudice, and oppress R. P. and G. H. P. in their trade of manufacturers of jappanned and tin wares, and to entice and seduce away the workmen of the said R. P. and G. H. P. from their employment, and thereby to injure and oppress the said R. P. and G. H. P. in their said trade; and Lord Campbell, C. J., said, 'We all agree in thinking that the sixteenth, seventeenth, and nineteenth counts are open to objection, as being too vague. We give no final opinion; but on these counts there will be a rule nisi to arrest the judgment, unless a *nolle prosequi* be entered, which the counsel for the crown consented to enter.'

A conspiracy to obstruct manufacturers in carrying on their business and to force them to consent to a certain scale of prices, and in pursuance thereof persuading the workmen to leave their employ, is illegal, though it be merely to gratify ill-will.

respect to their own actions and their own property ; and either, I believe, has a right to study to promote his own advantage or to combine with others to promote their mutual advantage.' Erle, J., then said that in this case there had been a combination to force the prosecutors to agree to a uniform book of prices ; and, after adverting to the different counts, added, ' If you should be of opinion that a combination existed for the purpose of obstructing the prosecutors in carrying on their business, and forcing them to consent to this book of prices, and, in pursuance of that concert, they persuaded the free men, and gave money to the free men, to leave the employ of the prosecutors, the purpose being to obstruct them in their manufacture, and to injure them in their business, and so to force their consent, with no other result to the parties combining than gratifying ill-will, I am of opinion that that would also be a violation of the law, and would warrant a conviction on the counts directed against that form of offence.' It was contended that this language led the jury to suppose that, although the combination were for a legitimate object, yet, if the means to be used would have the effect of obstructing the prosecutors in carrying on their business, it was an indictable conspiracy ; whereas, if the object of the workmen was to enforce their own rights, they were justified in doing so, though the effect were an obstruction of the prosecutors' business. But Erle, J., said that his words had no such meaning, and the Court of Queen's Bench saw no objection to the summing up. (*p*)

Unengaged workmen have a clear right to agree not to enter into any service unless they obtain a certain rate of wages ; but they have no right to combine to induce men in employ to leave their service, in order to compel their masters to raise their wages.

And on an indictment containing the same counts as the preceding case at the same assizes, Erle, J., told the jury ' that with respect to the law relating to the combinations of workmen, nothing can be more clearly established in point of law than that workmen are at liberty, while they are perfectly free from engagement, and have the option of entering into employ or not ; nothing can be more clear than that they have a right to agree among themselves to say, " We will not go into any employ unless we can get a certain rate of wages." But I think it would be most dangerous if that proposition were carried at all wider than the terms in which I put it ; that is to say, where workmen are perfectly free from engagement, having the option whether they will hire themselves or not, each man for himself may say, " I will go into no employ unless I can get a certain rate of wages," and all of them, if they choose, may say, " We will agree with one another that in our trade, as able-bodied workmen, we will not take employ unless the employers agree to give a certain rate of wages." But I think it would be most dangerous indeed if that rule of law, so in favour of workmen protecting their own interests, were at all construed to extend to that which is charged in this indictment ; that is to say, to suppose that workmen, who think that a certain rate of wages ought to be obtained, have a right to combine together to induce men, already in the employ of other masters (to leave their service), for the purpose of compelling those masters to raise their wages.' . . . ' I take it for granted that if a manufacturer has got a manufactory, and his capital embarked in it for the purpose

of producing articles in that manufactory, if persons conspire together to take away all his workmen, that would necessarily be an obstruction to him ; that would necessarily be a molesting of him in his manufactory,' and that would certainly be a conspiracy for an unlawful purpose. (q) 'The workmen have a right to agree that none of those who make the agreement will go into employ unless they are to receive a certain rate of wages ; but with respect to their fellow workmen, they have no right at all to agree to molest or intimidate or annoy other workmen in the same line of business, who refuse to enter into the agreement, and who choose to go and work for the employers at a lower rate of wages than that which the parties agree to rely on.' 'Let those without engagements agree to any terms they please, but they have no right to interfere with other workmen, who do not come into the agreement, and who are, of course, at liberty to go to any employers on any terms they choose' (r)

Any combination to molest or obstruct workmen who are willing to work is illegal.

The prosecutor was a builder, and employed a large number of men. In 1859 there had been a strike of workmen in the building trade, and the prosecutor determined not to employ any men who declined to work under a certain declaration. In May 1860 the prosecutor had some men in his employ who were working under this declaration, and the defendant and two others brought a paper signed by himself and about thirty other workmen, which informed the prosecutor that 'unless the men, who are working under the declaration in his shop, are discharged, and we have a definite answer by dinner-time to that effect, we cease work immediately.' The defendant, in reply to questions put by the prosecutor, said they had no fault to find with him, his foremen or clerks, or with the wages the defendant received ; but, being asked what he wanted, he said, 'You must discharge those two men who are working under the declaration, and if you do not we will leave work.' The prosecutor refused to be dictated to, and the defendant and all the men who had signed the paper left his employment ; and it was held that the defendant was rightly convicted, under the 6 Geo. 4, c. 129, s. 3, of unlawfully by threats endeavouring to force the prosecutor to limit the description of his workmen. (s)

What are threats and intimidation within the 6 Geo. 4, c. 129, s. 3.

(q) Reg. v. Duffield, 5 Cox, C. C. 404.

(r) Per Erle, J., *ibid.* See Hilton v. Eckersley, 6 E. & B. 47, where there was much discussion as to rights of masters and workmen to combine to protect their interests ; and Lord Campbell, C. J., after citing the dictum of Grose, J., in *Rex v. Mawbey*, 6 T. R. 636, there said, 'I cannot bring myself to believe, without authority much more cogent, that if two workmen, who sincerely believe their wages to be inadequate, should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence, or any illegal means for gaining their object, they would be guilty of a misdemeanor.' See *Hornby v. Close*, 36 L. J. M. C. 43 ; *Farrar v. Close*, 38 L. J. M. C. 122.

(s) *Walsby v. Anley*, 3 Law T. 666,

A.D. 1861. Cockburn, C. J., 'Every workman in the service of an employer is entitled to the full exercise of his discretion as to whether he will continue in that employment, so long as he is not bound by any contract, and to give his employer the alternative of either losing his services, or discharging obnoxious persons with whom he might not choose to work ; and more than that, several men, who might consider other workmen as obnoxious, have a perfect right to put the same alternative to their employer. But if the men go further than that, and seek to coerce the master by the threat of what is likely to operate to his injury, that comes within the meaning of the Act. In the present case, it was not one man who went to the employer, but several, who adopted the same course ; not with the view of giving him an opportunity of

So where one Longman was a member of the United Boiler Makers and Iron Shipbuilders' Society, and in the employ of Messrs Kruger; and they had ordered one Norfolk, who was not a club-man, to work on boilers by bending angle iron, and he did so. Longman attended a meeting of the club, summoned 'to stop an encroachment,' and found the encroachment was 'Norfolk's working at the angle iron;' a resolution was passed that the men belonging to the society should not be allowed to work at Messrs. Kruger's if Norfolk was allowed to work at angle iron work. O'Neill, the chairman of the meeting, told Longman and others that, being club-men working at Kruger's yard, they would have to come out if Norfolk was not knocked off angle work. A deputation from the club waited on Messrs. Kruger, but produced no effect. Longman was then summoned to another meeting, at which a report of the deputation was made, and Longman was asked by O'Neill, from the chair, whether he intended to remain an honourable member, and leave the shop (Kruger's), or stay in the shop, and be despised by the club, and have his name sent round all over the country in the report, and be put to all sort of unpleasantness. Longman told O'Neill that, if there were anything to undergo, he would bear the consequences. He had further time granted him for consideration, but ultimately refused to leave his employment. It was held, chiefly on the authority of the preceding case, that O'Neill was guilty of having unlawfully, by threats and intimidation, endeavoured to force Longman to depart from his service. What was said would operate most formidably on the mind of a person who felt that he would be deprived of all the benefit he would otherwise obtain from the club, and be dismissed from it, and put to all sorts of unpleasantness. It was difficult to conceive what sort of threat could be intended to come within the meaning of the Act, short of personal violence, if this were not such a threat. (t)

The respondent, a master bricklayer, with his men, were employed on a building, and the appellant, Barrow, and another man (O'Hare), were about thirty yards off. They spoke to two of his men, who immediately afterwards took away their tools, and ceased to work for respondent. This they were at liberty to do by their agreement. The respondent asked Barrow and O'Hare why the men had been stopped, and they told him, 'He must know it was on account of his apprentices.' At that time the respondent had four apprentices. Two or three weeks afterwards respondent wrote to Barrow, as the Secretary of the United Order of Bricklayers' Association, asking to be informed of the reason that his men were taken away from him, and stating that he had heard

exercising his discretion, but, by threatening to leave his employ, to compel and coerce him to discharge the obnoxious persons.' Hill, J., 'The word "threat" in the Act must be construed with those which precede and follow. It may be a threat to do an illegal act; and the question is, whether the act threatened to be done is an illegal act. A man has a perfect right to go to an employer, and say all that was said, in this case, or

several might do it; but if they acted in combination, not honestly and independently, but for the purpose of coercing the master, they are guilty of a conspiracy at common law. The combination, and the attempt to carry it out, were illegal.' See *R. v. Druitt*, 10 Cox, C. C. 592.

(t) *O'Neill v. Longman*, 9 Cox, C. C. 360, A.D. 1863. 4 B. & S. 376. *O'Neill v. Kruger*, 4 B. & S. 339.



that it was because he employed too many apprentices, and that he should like to know what the society required him to do. In reply, a letter was sent in Barrow's handwriting in these terms: "At a summoned meeting of the United Order of Bricklayers it was proposed, seconded, and carried unanimously, that no society bricklayer will work for Thomas Bowron until such time as he parts with some of his apprentices, namely, he will be allowed two; and when his oldest apprentice arrives to his last year of servitude he will be allowed a third, and until then there will be no society bricklayer work for him; and further, there will be so much expenses to pay as well before any society bricklayer will work for the said Thomas Bowron.' The appellant Wood acted as chairman and Barrow as secretary at the meeting at which the letter was written. Shortly after the meeting a demand of 18*l.* was made by Wood, who stated that that sum must be paid before they would allow any men to work for the respondent. Held, that the above facts were not sufficient to sustain the conviction of the appellant under 6 Geo. 4, c. 129, s. 3 (now repealed) for unlawfully, by using certain threats, forcing, or endeavouring to force, the respondent to limit the number of his apprentices. (*u*)

By sect. 3 of the 6 Geo. 4. c. 129 (now repealed), it is enacted that if any person shall, by threats or intimidation, force, or endeavour to force, any manufacturer, or person carrying on any trade or business, to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants, he shall, being convicted thereof, be imprisoned, &c.

The appellant, secretary of a lodge of the General Union of Carpenters and Joiners, delivered to the respondent, a builder, the following notice:—

‘MR. WILLIAM KITCH,

‘Sir,—I am requested by the committee of Carpenters and Joiners to give the men in your employ notice to come out on strike against James Jordan, unless he become a member of the above society, not being any way disrespectful to you or him, but

(*u*) Wood v. Bowron, 10 Cox, C. C. 344, *et per* Lush, J., ‘I am also of the same opinion, that there is no evidence to sustain the conviction. After the decisions that have been given upon this statute, it is too late to say that the word “threat” is limited to the declaration of an intention to do acts which have an intimate connection with injury or personal violence to another. The cases that have been decided show that the word must have a wider sense than has been put upon it, namely, a threat by act or words for the purpose of doing some injury to another person; that would come within the meaning of a threat within the Act of Parliament. I apprehend that it is very essential to a “threat,” that it should be made for the purpose of intimidating the person to whom it is addressed.

Now, here an agreement was come to not to work for the master until he reduced the number of his apprentices. Whatever its quality might be at common law, certainly it is no offence against the statute; nevertheless, it is not so used as to constitute a threat. The question, in my mind, is whether it was used for a purpose which could be construed into a threat within the meaning of the statute? When I find the resolution passed was not communicated to the master, except in answer to his inquiry, by way of explanation why these persons had left his employment, and then communicated simply for the purpose of giving that information, it seems to me that it wants the essential element of a threat. Therefore, I am of opinion that the appellants were not rightly convicted.’

being compelled by the Union and laws. This notice will be carried out after the 27th inst., unless settled in accordance with the Society's laws. I remain, yours most respectfully, THOMAS SKINNER, Secretary.'

Held, that the appellant had thereby brought himself within the operation of the 3rd section as above mentioned. (*v*)

(*v*) *Skinner v. Kitch*, 10 Cox, C. C. 493.

## CHAPTER THE THIRD.

## OF LIBEL AND INDICTABLE SLANDER.

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## SEC. I.

*Definition Of.*

It appears to be well settled that publications blaspheming God, or turning the doctrines of the Christian religion into contempt and ridicule, may be made the subject of indictment; and it is now fully established, though some doubt seems formerly to have been entertained upon the subject, that such immodest and immoral publications as tend to corrupt the mind, and to destroy the love of decency, morality, and good order, are also offences at common law. (a) It is also a misdemeanor wantonly to defame or indecorously to calumniate that economy, order and constitution of things which make up the general system of the law and government of the country. (b) And it is especially criminal to degrade or calumniate the person and character of the sovereign, and the administration of his government by his officers and ministers of state, (c) or the administration of justice by his judges. (d) And the same policy which prohibits seditious comments on the King's conduct and government extends, on the same grounds, to similar reflections on the proceedings of the two Houses of Parliament. (e) Such publications also as tend to cause animosities between this

What publications in general are libellous.

(a) See the cases collected in 2 Starkie Campb. 398.  
on Libel, 155.

(b) Holt on Libel, 82.

(c) Rex v. Lambert and Poynter.

(d) 2 Starkie on Libel, 194.

(e) 2 Starkie on Libel, 202.

country and any foreign state, by the personal abuse of the sovereign of such state, his ambassadors, or other public ministers, may be treated as libels. (*f*) With respect to libels upon individuals, they have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule. (*g*)

Of slanderous words.

Upon some of these subjects a publication by slander, or words spoken only, though not properly a libel, (*h*) may be the subject of criminal proceeding, as will be shown in the course of the chapter.

Of the mode of expression.

A libel may be as well by descriptions and circumlocutions as in express terms, therefore scandal conveyed by way of allegory or irony amounts to a libel. As where a writing, in a taunting manner, reckoning up several acts of public charity done by a person, said, '*You will not play the Jew, nor the hypocrite,*' and then proceeded, in a strain of ridicule, to insinuate that what the person did was owing to his vainglory. Or where a publication, pretending to recommend to a person the characters of several great men for his imitation, instead of taking notice of what great men are generally esteemed famous for, selected such qualities as their enemies accuse them of not possessing (as by proposing such a one to be imitated for his courage who was known to be a great statesman, but no soldier; and another to be imitated for his learning who was known to be a great general, but no scholar); such a publication being as well understood to mean only to upbraid the parties with the want of these qualities as if it had done so directly and expressly. (*i*) And, upon the same ground, not only an allegory, but a publication in hieroglyphics, or a rebus or anagram, which are still more difficult to be understood, may be a libel. (*j*) So a libel may be by asking questions; for if a man insinuates a fact in asking a question; meaning thereby to assert it, it is the same thing as if he asserted it in terms. (*k*) Formerly it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded: they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. (*l*)

(*f*) *Rex v. Peltier*, Holt on Libel, 78. *Rex v. D'Eon*, 1 Blac. R. 517.

(*g*) 1 Hawk. P. C. c. 73, ss. 1, 2, 3, 7. Bac. Abr. tit. *Libel*; *R. v. Yates*, 12 Cox, C. C. 233, and see as to libel by a picture, *Du Bost v. Beresford*, 2 Campb. 511. As to defaming one who is dead, see *post*, p. 208.

(*h*) A libel is termed *libellus famosus seu infamatoria scriptura*, and has been usually treated of as scandal, written or expressed by symbols. Lamb. Sax. Law. 64. Bract. lib. 3, c. 36. 3 Inst. 174. 5 Co. 125. 1 Lord Raym. 416. 2 Salk. 417, 418. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology. 'There is no other name but that of *libel* applicable to the offence of libelling, and we know the offence specifically by

that name, as we know the offences of horse-stealing, forgery, &c., by the names which the law has annexed to them.' By Lord Camden in *Rex v. Wilkes*, 2 Wils. 121.

(*i*) 1 Hawk. P. C. c. 73, s. 4. Bac. Abr. tit. *Libel* (A) 3.

(*j*) Holt on Libel, 235, 236.

(*k*) Gathercole's case, 2 Lewin, 255, per Alderson, B.

(*l*) By Lord Ellenborough, C. J., in *Rex v. Lambert and Perry*, 2 Campb. 403. And in a case of libel, *Rex v. Watson and others*, 2 T. R. 206, Buller, J., said, 'Upon occasions of this sort I have never adopted any other rule than that which has been frequently repeated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel as men of common understanding,

Upon the same principles it has been resolved that a defamatory writing, expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to signify a particular person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large. (*m*)

An indictment lies for general imputations on a body of men, though no individuals be pointed out, because such writings have a tendency to inflame and disorder society, and are therefore within the cognizance of the law. (*n*) And scandal published of three or four persons is punishable on the complaint of one or more, or all of them. (*o*)

It appears to have been considered that the remedies by action and indictment for libels are co-extensive, and may be regarded as upon the same footing. (*p*)

Formerly, upon an indictment or criminal prosecution for a libel the party could not justify that its contents were true. But the 6 & 7 Vict. c. 96, permits a defendant to plead to any indictment or information for a defamatory libel that the libellous matters are true, provided it was for the public benefit that such matters should be published. (*q*) The ground of the former rule, which still exists where no such plea is pleaded, is, in the case of libels against religion, morality, or the constitution, the *public mischief*, which libels are calculated to create in alienating the minds of the people from religion and good morals, and rendering them hostile to the government and magistracy of the country; and, where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the public peace. A libel against an individual may consist in the exposure of some personal deformity, the actual existence of which would only show the greater malice in the defendant; and even if it contain charges of misconduct founded in fact, the publication will not be the less likely to produce a violation of the public tranquillity. It has been observed, that the greater appearance of truth there may be in any malicious invective, it is so much the more provoking; and that, in a settled state of government, the party grieved ought to complain, for every injury done to him, in the ordinary course of law, and not by any means to avenge him-

Name of person libelled in blanks.

Indictment will lie for a libel on a body of men.

Actions and indictments for libels co-extensive.

The party could not formerly justify that the libel was true, but he may now in cases falling within the 6 & 7 Vict. c. 96.

and say whether in their minds it conveys the idea imputed.' See *Woolnoth v. Meadows*, 5 East, 463.

(*m*) 1 Hawk. P. C. c. 73, s. 5. Bac. Abr. tit. *Libel* (A) 3, where it is said in the marginal note that if an application is made for an information in a case of this kind, some friend to the party complaining should, by affidavit, state the having read the libel, and understanding and believing it to mean the party. See *Du Bost v. Beresford*, 2 Campb. 512.

(*n*) *Holt on Libel*, 237. See *Le Fanu v. Malcomson*, 1 H. L. 637, *post*.

(*o*) *Id. ibid.* In *Rex v. Benfield*, 2 Burr. 980, it was held that an information lay against two for singing a libel-

lous song on A. and B., which first abused A. and then B. And it was said that if the defendants had sung separate stanzas, the one reflecting on A. and the other on B., the offence would still have been entire. See *Rex v. Jenour*, 7 Mod. 400.

(*p*) *Starkie on Libel*, 150, 165, 550, 1st edit. *Holt on Libel*, 215, 216. *Bradley v. Methuen*, 2 Ford's MS. 78. This must be understood, however, of cases where the libel, from its nature and subject, inflicts a private injury, and not of those cases in which the public only can be said to be affected by the libel.

(*q*) See the Act, *post*, p. 227.

self by the odious proceeding of a libel. (r) See further as to this, *post*, p. 205.

It is no defence that it was copied from some other work.

A party will not be excused by showing that the libel with which he is charged was copied from some other work, even, though he may have stated it to be merely a copy, and disclosed the name of the original author at the time of its publication. (s)

## SEC. II.

### *Privileged Communications.*

Petition to the King.

But there are some circumstances which will prevent a publication from being deemed libellous. A petition to the King to be relieved from doing what the King has directed the party to do, if *bonâ fide* and in respectful terms, is no libel, though it call in question the legality of the King's direction. James II. published a declaration of liberty of conscience and worship to all his subjects, dispensing with the oaths and tests prescribed by statutes 25 & 30 Car. II., and directed that it should be read two days in every church and chapel in the realm, and that the bishops should distribute it in their dioceses that it might be so read. The Archbishop of Canterbury and six bishops presented a petition to the King praying that he would not insist upon their distributing and reading it, principally because it was founded on such a dispensing power as had oftentimes been declared illegal in Parliament, and that they could not in prudence, honour, or conscience, so far make themselves parties to it as to distribute and publish it. This petition was treated as a libel: they were taken up and tried for it. The publication was proved; and Wright, C. J., and Allibone, J., thought it a libel: but Holloway and Powell, JJ., thought otherwise, there not being an ill intention of sedition in the bishops, and the object of their petition being to free themselves from blame in not complying with the King's command. The jury found them not guilty. (t)

Petitions to Parliament. Proceedings in courts of justice.

It has been resolved that no false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecution in respect of their applications to

(r) 1 Hawk. P. C. c. 73, s. 6. Bac. Abr. tit. *Libel* (A.) 5. 4 Blac. Com. 150, 151. 2 Starkie on Libel, 251, *et seq.* Holt on Libel, 275, *et seq.* But whilst the truth was no justification in a criminal prosecution, yet in many instances it was considered as an extenuation of the offence; and the Court of King's Bench has laid down this general rule, that it will not grant an information for a libel unless the prosecutor who applies for it makes an affidavit asserting directly and pointedly that he is innocent of the charge imputed to him. This rule, however, may be dispensed with if the person libelled resides abroad, or if the imputa-

tions of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in Parliament. 4 Blac. Com. 151, note (6). Dongl. 271, 372. R. v. Aunger, 12 Cox, C. C. 407.

(s) *De Crespigny v. Wellesley*, 5 Bing. 392. 2 M. & P. 695. See *R. v. Sullivan*, 11 Cox, C. C. 44, (Irish); *Reg. v. Newman, post*; *M'Pherson v. Daniels*, 10 B. & C. 263; *Watkin v. Hall*, 37 L. J. Q. B. 125.

(t) *Case of the Seven Bishops*, 12 St. Tri. 183; and see *post*, as to communications made *bonâ fide*, and in the proper course of proceedings in courts of justice, &c.

a court of justice. (u) Thus where the defendant, in a certain affidavit before the Court, had said that the plaintiff in a former affidavit against the defendant had sworn falsely, the Court held that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood. (v) No presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence in any way to discourage them from making their inquiries with that freedom and readiness which the public good requires. (w) Where an action was brought against the president of a military court of inquiry for a libel contained in the minutes of such court, which had been delivered by the defendant to the commander-in-chief and deposited in his office, it was held that these minutes were a privileged communication, and properly rejected when tendered at the trial in proof of the alleged libel; and also that a copy of them had been properly rejected. (x) And where a court-martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused was highly injurious to the service, it was held that the president of the court-martial was not liable to an action for a libel for having delivered such sentence and declaration to the judge-advocate; and Mansfield, C. J., in delivering his opinion, said: 'If it appear that the charges are absolutely without foundation, is the president of the court-martial to remain perfectly silent on the conduct of the prosecutor, or can it be any offence for him to state that the charge is groundless and malicious?' (y)

It having been reported that the plaintiff, an officer in the army, had made charges against his brother officers, the commander-in-chief directed that a court of enquiry should be assembled who should enquire into the matter, and report thereon to the commander-in-chief. A court was held, at which the defendant, an officer in the army, was required to attend as a witness. Being examined as a witness he gave *viva voce* evidence, and then handed in a paper containing in substance a repetition of his evidence, with some additions upon the subject, and this paper was received by the court. A report was made by the court to the commander-in-chief. The plaintiff applied for a court-martial upon the defendant for such his conduct towards the plaintiff. The application was

(u) 1 Hawk. P. C. c. 73, s. 8. Bac. Abr. tit. *Libel* (A.) 4. And see the judgment of Holroyd, J., in *Hodgson v. Scarlett*, 1 B. & A. 232. It is holden by some that no want of jurisdiction in the court to which the complaint shall be exhibited will make it a libel; because the mistake of the court is not imputable to the party, but to his counsel; see 1 Hawk. P. C. c. 73, s. 8, 1 Starkie on Libel, 254, 2nd edit.

*Revis v. Smith*, 18 C. B. 126. *Henderson v. Broomhead*, 4 H. & N. 569, cases of malicious and false affidavits. See *Fitzjohn v. Mackinder*, 9 C. B. (N. S.) 505; *Doyle v. O'Doherty*, C. & M. 418.

(w) 1 Hawk. P. C. c. 73, s. 8. Bac. Abr. tit. *Libel* (A.)

(x) *Horne v. Lord F. C. Bentinck*, 4 Moore, 563.

(y) *Jekyll v. Sir John Moore*, 2 N. R.

(v) *Astley v. Younge*, 2 Burr. 344. Digitized by Microsoft®

not acceded to, and the plaintiff brought an action against the defendant, in respect of the written paper as a libel, and in respect of the *vivâ voce* evidence as slander. The judge at the trial ruled that the action would not lie if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a military enquiry in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of the enquiry, although the defendant had acted *malâ fide*, and with actual malice, and without any reasonable and probable cause, and with a knowledge that the statement made and handed in by him as aforesaid was false. A bill of exceptions having been tendered: Held, that this ruling as to the law was correct. Held, also, that the evidence of the defendant was but a parcel of the minutes of the proceedings of the Court, which, when reported and delivered to the commander-in-chief, was received and held by him on behalf of the sovereign, and as such was inadmissible in evidence. (z)

And speeches of members of Parliament are privileged.

The members of the two houses of Parliament, by reason of their privilege, are not answerable at law for any personal reflections on individuals contained in speeches in their respective houses; for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public, should, in the execution of their high functions, be wholly uninfluenced by private considerations. (a)

How far the publication of proceedings in courts of justice is allowable.

Thus the actual proceedings in courts of justice and in Parliament are exempted from being deemed libellous; it becomes important to inquire in the next place how far the same privilege will be extended to communications of those proceedings to the public, made with impartiality and correctness.

In *Wason v. Walter*, 4 L. R. Q. B. 73, 38 L. J. Q. B. 34, Cockburn, C. J., in delivering the judgment of the Court said, that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. (b) But a publication of the proceedings in a court of justice will not be protected unless it be a *true and honest* statement of those proceedings. (c) And it has been said that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances and with whatever motive published, justifiable; and that such doctrine must be taken with grains of allowance. (d) And Lord Ellen-

(z) *Dawkins v. Lord Rokeby*, 42 L. J. Q. B. 63, Ex. Ch. *et per Kelly*, C. B., no action lies against parties or witnesses for anything said or done, although falsely and maliciously, and without any reasonable or probable cause, in the ordinary course of any proceedings in a court of justice. Affirmed in H. L. 45, L. J. Q. B. 8.

(a) *Holt on Libel*, 190. 1 Starkie on Libel, 239. *Rex v. Lord Abingdon*, 1 Esp. Rep. 226. By 4 Hen. 8, c. 3, members of Parliament are protected from all charges against them for anything said in either House; and this is

further declared in the Bill of Rights, 1 Will. & M. st. 2, c. 2.

(b) See also *Curry v. Walter*, 1 Bos. & Pull, 523. A defence that the matter complained of is so privileged, can be given in evidence under not guilty.

(c) *Waterfield v. The Bishop of Chester*, 2 Mod. 118. *Rex v. Wright*, 8 T. Rep. 297, 298, per Lawrence, J. *Stiles v. Nokes*, 7 East, 493; *Wason v. Walter*, 38 L. J. Q. B. 34.

(d) By Lord Ellenborough, C. J., and Grose, J., in *Stiles v. Nokes*, 7 East, 503.



borough, C. J., said, 'It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of individuals on whom they reflect: and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous merely because the matter had been given in evidence in a court of justice.' (e) In a subsequent case, not relating directly to this point, but to the publication of proceedings in Parliament, Bayley, J., said, 'It has been argued that the proceedings of courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced; would every one be at liberty to poison the minds of the public, by circulating that which for the purposes of justice the Court is bound to hear? I should think not: and it is not true, therefore, that in all instances the proceedings of a court of justice may be published.' (f) This doctrine was recognized and acted upon in a later case. The defendant's husband had been convicted of publishing a blasphemous libel, after having in his defence at the trial used arguments and statements of a blasphemous and indecent description. His wife published the trial; and, upon showing cause against a rule for a criminal information, it was urged that she had a right to publish what actually took place in a court of justice: but the Court were clear she had not, if that statement contained anything seditious, blasphemous, or indecent: and the rule was made absolute. (g) And where it is allowable to publish what passes in a court of justice it is not essential that every word of the evidence, of the speeches, and of what was said by the judge, should be inserted; if the report is substantially a fair and correct report of what took place in a court of justice, it is privileged. (h) It may sometimes not be justifiable to publish everything a counsel says in the course of his speech, (i) but no action will lie against a barrister for words spoken by him in a cause, which are pertinent to the matter in issue. (j) And an attorney acting as an advocate has the same privilege. (k)

The party making the publication will not be justified, unless he confines himself to what actually passed in court. (l) Before the case of *Wason v. Walter*, noticed *post*, p. 185, was decided, it was an established principle, upon which the privilege of publishing a report of *any* judicial proceedings was admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what formed strictly and properly the legal

(e) *Ibid.* And see *Rex v. Salisbury*, 1 Lord Raym. 341, that it is indictable to publish a scandalous petition to the House of Lords, or a scandalous affidavit made in a court of justice.

(f) *Rex v. Creevey*, 1 M. & S. 281.

(g) *Rex v. Carlisle*, 3 B. & A. 167; *Steele v. Brannan*, 41 L. J. M. C. 85, where a report of proceedings in a court of justice was held not to be privileged, as the same was offensive to public decency.

(h) *Andrews v. Chapman*, 3 C. & K. 286, Lord Campbell, C. J. See *Smith v.*

*Scott*, 2 C. & K. 580. *Hoare v. Silverlock*, 9 C. B. 20. See *Lewis v. Walter*, 4 B. & A. 645.

(i) Per Bayley, J., *Flint v. Pike*, 4 B. & C. 473. 6 D. & R. 528. Per Holroyd, J., *ibid.* and per Tindal, C. J. *Roberts v. Brown*, 10 Bing. 519; *Saunders v. Mills*, 6 Bing. 213. S. C. 3 M. & P. 520; *R. v. Creevey*, 1 M. & Sel. 281.

(j) *Hodgson v. Scarlett*, 1 B. & Ald. 232.

(k) *Mackay v. Ford*, 5 H. & N. 792.

(l) *Legal v. Highley*, 3 B. N. C. 950.

Proceedings  
before justices  
of the peace.

proceedings. But perhaps it will now be considered that a fair comment upon any matter of public interest is privileged. (*m*)

Proceedings before magistrates, under the 11 & 12 Vict. c. 43, with respect to summary convictions and orders, in which, after both parties are heard, a final judgment is given, are strictly of a judicial nature, and the trial and the judgment may lawfully be made the subject of a printed report, if that report be impartial and correct; (*n*) and the like privilege extends to the publication of proceedings taking place publicly before a magistrate on the preliminary investigation of a charge of an indictable offence, terminating in the discharge of the party charged, although there were several hearings, and separate publications as to each hearing; (*o*) but it has not yet been decided that the publication of such preliminary inquiries is lawful where they end in the case being sent for trial. (*p*) The publication of preliminary examinations before a magistrate, taken *ex parte*, have been held not to come within the principle by which the fair reports of proceedings in courts of justice are privileged. It has been said that such publications have a tendency to cause great mischief by perverting the public mind, and disturbing the course of justice; and, if they contain libellous matter, will be considered as criminal. (*q*) And the Court of King's Bench has granted a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments; although the statement was correct, and the party had no malicious motive in the publication. (*r*) But in *Wason v. Walter*, 38 L. J. Q. B. 34, decided since the above cases, Cockburn, C. J., whilst delivering the judgment of the Court, is reported to have said, 'Even in quite recent days, judges, in holding the publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this Court, as, for instance, on application for criminal informations, are published every day; but such a thing as an action or indictment, founded on a report of such an *ex parte* proceeding, is unheard of, and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was, or was not, *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.'

*Ex parte*  
examinations  
before a  
magistrate.

Examination of  
a prisoner by  
registrar in  
bankruptcy.

The examination of a prisoner in gaol by the registrar in bankruptcy, under the 101st section of the Bankruptcy Act, 1861, is a public judicial proceeding, and therefore a fair and correct report,

(*m*) *Delegal v. Highley*, 3 B. N. C. 950; *Lewis v. Clement*, 3 B. & A. 702.

(*n*) *Lewis v. Levy*, E. B. & E. 537.

(*o*) *Ibid.*

(*p*) *Ibid.*

(*q*) *Rex v. Lee*, 5 Esp. 123. *Rex v. Fisher*, 2 Campb. 563. *Duncan v. Thwaites*, 3 B. & C. 556. 5 D. & R. 447. *Delegal v. Highley*, 3 B. N. C. 950; but see the remarks in *Lewis v. Levy*, *supra*. And *Original day the*

fendant justify the publication of a matter which was not brought before the magistrate in his judicial character, or in the regular discharge of his magisterial functions. *M'Greger v. Thwaites* and another, 3 B. & C. 24; 4 D. & R. 695.

(*r*) *Rex v. Fleet*, 1 Barn. & Ald. 379. See *East v. Chapman*, M. & M. 46. 2 C. & P. 570; *Charlton v. Watten*, 6 C. & P. 835; *R. v. Gray*, 10 Cox, C. C.

without comment, of the examination, is privileged, even though it may contain statements which injuriously affect the character of a third person. (s)

In general a fair report in a newspaper of what takes place at a public meeting, if it contain matter defamatory of an individual, is not privileged. Therefore a fair report of what took place at a public meeting of the West Hartlepool Commissioners, acting under the powers of an Act of Parliament, and which contained injurious expressions concerning an individual, is not privileged. (t)

Proceedings of public meetings.

If a report made by a medical officer of health to a vestry board, in pursuance of the Metropolitan Local Management Act (18 & 19 Vict. c. 120) contains libellous matter, a newspaper proprietor is not justified in publishing it. (u)

Medical report to a vestry.

The publication of a faithful report of a debate in either house of Parliament is privileged, so that the publisher is not responsible for defamatory statements made in the course of the debate so reported and published, and the publication of articles fairly commenting upon the debate so reported and published is equally privileged. (v) The printing and delivering a petition to members of a committee of the House of Commons, being according to the order of proceedings of Parliament and their committees, has been held to be justifiable. (w)

How far the publication of proceedings in Parliament is allowable.

It was decided upon demurrer in a case, which underwent great consideration, that it is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by orders of the House, printed

Stockdale v. Hansard.

(s) Ryalls v. Leader, 35 L. J. Ex. 185; L. R. Ex. 296.

(t) Davison v. Duncan, 7 E. & B. 229.

(u) Popham v. Pickburn, 7 H. & N. 891.

(v) Wason v. Walter, 38 L. J. Q. B. 34, *et per cur.*, "our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of R. v. Lord Abingdon, 1 Esp. 225, and R. v. Creevey, 1 M. & S. 273. At the same time it may be as well to observe that we are disposed to agree with what was said in Davidson v. Duncan, 7 E. & B. 232, as to such a speech being privileged if *bona fide* published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in parliament. We pass on to the second branch of this rule, which has reference to alleged misdirection in respect of the second count of the declaration, which is founded on the article in the *Times*, commenting on the debate in the House of Lords; and the conduct of the plaintiff in preferring the petition which gave rise to it. We are of opinion that the direction given to the jury was perfectly correct. The publi-

cation of the debate having been justifiable, the jury were properly told that the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made; and that consequently the occasion was privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts; in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice; but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion, that a person taking upon himself publicly to criticize and to condemn the conduct or motives of another must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem under the circumstances of the case a fair and legitimate criticism on the conduct and motives of the party who is the object of censure. See *Henwood v. Harrison*, 41 L. J. C. P. 206.

(w) *Lake v. King*, 1 Saund. 131. See the judgment of Lord Ellenborough, C. J., in *Rex v. Creevey*, 1 M. & S. 278.

and published by the defendant; and that the House of Commons had theretofore resolved, 'that the power of publishing such of its reports, votes, and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons' House of Parliament, as the representative portion of it.' (x)

In consequence of this decision the 3 & 4 Vict. c. 9, was passed, which by Sec. 1, reciting, 'whereas it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned:' enacts, 'that it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior courts of Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed

Proceedings, criminal or civil, against persons for publication of papers printed by order of Parliament, to be stayed, upon delivery of a certificate and affidavit to the effect that such publication is by order of either House of Parliament.

(x) *Stockdale v. Hansard*, 9 A. & E. 1, 2 P. & D. 1. See *Wason v. Walter*, *supra*, per Cockburn, C. J.; *Henwood v. Harrison*, 41 L. J. C. P. 206, per Willes, J., 'By 39 Geo. 3, c. 79, (An Act for the more effectual suppression of societies established for seditious and treasonable

purposes; and for better preventing treasonable and seditious practices) s. 28, nothing in this Act contained shall extend or be construed to extend to any papers printed by the authority and for the use of either House of Parliament.' See 32 & 33 Vict. c. 24.

and taken to be finally put an end to, determined, and superseded by virtue of this Act.' (y)

Sec. 2. 'In case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to lay before the court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.'

Proceedings to be stayed when commenced in respect of a copy of an authenticated report, &c.

Sec. 3. 'It shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or an abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury a verdict of not guilty shall be entered for the defendant or defendants.'

In any proceedings it may be shown that such extract was *bonâ fide* made.

Sec. 4. 'Nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.'

A publication commenting upon a literary work, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer, unconnected with his publication. (z) But if a person, under the pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller. (a) So if a reviewer imputes base, sordid, dishonest, and wicked motives, it is no answer that the reviewer published only what he believed was correct and true. (b) A fair and candid comment on a place of public entertainment, in a newspaper, is not a libel. (c) And there is no distinction between a handbill, circular, or advertisement of a tradesman and a book; both are

Comments upon literary productions.

(y) The Act is imperative upon the Court to stay proceedings. *Stockdale v. Hansard*, 11 A. & E. 297. 3 P. & D. 346.

(z) *Carr v. Hood*, 1 Campb. 355. And in an action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, may adduce evidence to show that the supposed libel is a fair stricture upon the general run of the plaintiff's publications. *Tabart v. Tipper*, 1 Campb. 350; *Strauss v. Francis*, 4 F. & F. 1107. If the plaintiff contends that the alleged libel exceeds the limits of fair criticism, he should,

unless the contrary appears on the face thereof, put in his work as part of his case (S. C. and see 4 F. & F. 939.)

(a) *Nightingale v. Stockdale*, 49 Geo. 3, cor. *Ellenborough*, C. J. Selw. N. P. 1044. It is lawful to animadvert upon the conduct of a bookseller in publishing books of an improper tendency. *Tabart v. Tipper*, 1 Campb. 354. And see *Herriot v. Stuart*, 1 Esp. 437, and *Stuart v. Lovell*, 2 Stark. R. 93.

(b) *Campbell v. Spottiswoode*, 31 L. J. Q. B. 185. 3 B. & S. 769.

(c) *Dibden v. Swan*, 1 Esp. N. P. C. 25, and see also *Ashley v. Harrison*, 1 Esp. N. P. C. 48. *Peake*, N. P. C. 194.

literary productions, and are addressed to the public, and both are subject to such comments as do not exceed the bounds of fair and reasonable criticism. (*d*)

Sermons.

It has been doubted whether the preaching a sermon, in the ordinary mode of a clergyman's duty, makes it public property, so as to allow observations upon it in the same way that a publication of a literary work does. (*e*)

Conduct at public meeting.

A fair comment in a newspaper upon the conduct of a person attending a meeting, held for the purpose of hearing a candidate at a parliamentary election, was held to be privileged. (*f*)

Confidential communications.

Confidential communications are in some cases privileged: as where it was holden that a letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which B., the writer of the letter, was likewise interested, was not a libel. (*g*) And if a person, in a private letter to the party, should expostulate with him about some vices, of which he apprehends him to be guilty, and desire him to refrain from them; or if a person should send such a letter to a father, in relation to some faults of his children; these, it seems, would not be considered as libellous, but as acts of friendship, not designed for defamation but reformation. (*h*) But this doctrine must be applied with some caution; since the sending an abusive letter filled with provoking language to another, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and cause a disturbance of the public peace; (*i*) and the reason assigned by Lord Bacon, why such private letter should be punishable, seems to be a very sufficient one, namely, that it enforces the party to whom the letter is directed to publish it to his friends, and thus induces a compulsory publication. (*j*) And though a letter written by a master, in giving a character of a servant, will not be libellous, unless its contents be not only false but malicious; (*k*) yet in such a case malice may be inferred from the circumstances. (*l*)

Where a writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has by his situation to protect the interests of another, that which he writes under such circumstances is a privileged communication, if he writes it *bonâ fide*. If, therefore, a tenant be desired by his landlord to make communications to him in respect of any neglect of duty in his gamekeepers, any communication made by him in respect of any

(*d*) *Paris v. Levy*, 9 C. B. (N. S.) 342.

(*e*) *Gathercole v. Miall*, 15 M. & W. 319. See *Kelly v. Tinning*, 35 L. J. Q. B. 231, noticed *post*, p. 192.

(*f*) *Davies v. Duncan*, 43 L. J. C. P. 185.

(*g*) *M'Dougall v. Claridge*, 1 Campb. 267. *Wright v. Woodgate*, 1 T. & G. 12.

(*h*) *Peacock v. Sir George Reynell*, 2 Brownl. 151, 152. *Bac. Abr. tit. Libel* (A.) 2, in the notes.

(*i*) *Bac. Abr. tit. Libel* (B.) 2. *Rex v. Cator*, 2 East, R. 361. *Thorley v. Lord Kerry*, 4 Taunt. 365. In the last case the letter was unsealed, and opened and read

by the bearer.

(*j*) *Poph. 189*, cited in *Holt on Libel*, 222.

(*k*) *Weatherstone v. Hawkins*, 1 T. R. 110. *Edmondson v. Stephenson*, Bull. N. P. 8. *Child v. Affleck*, 9 B. & C. 403. 4 M. & R. 338. *Manby v. Witt*, 18 C. B. 544. *Taylor v. Hawkins*, 16 Q. B. 308. *Somerville v. Hawkins*, 10 C. B. 583. *Gardener v. Slade*, 13 Q. B. 796. *Croft v. Stevens*, 6 H. & N. 570.

(*l*) *Rogers v. Sir G. Clifton*, 3 Bos. & Pul. 587. *Patteson v. Jones*, 8 B. & C. 578. 3 M. & R. 101. *Kelly v. Partington*, 4 B. & Ad. 700. 2 Nev. & M. 460.

such neglect of duty is privileged, if written *bonâ fide*, and on the supposition that he was doing his duty to his landlord. (m) The plaintiff was the agent of the defendants, a trading company, and it was part of his duty to furnish them with an account of his transactions, to enable them to prepare the balance-sheet for the inspection of the shareholders. This balance-sheet was prepared and duly referred to the auditors, who reported that there was a deficiency, for which the plaintiff was responsible, and that his accounts had been badly kept. There was evidence that an explanation had been offered to the auditors, which they had disregarded, but no evidence that the directors had any knowledge of this explanation. The directors, after laying the accounts before a general meeting of the shareholders, caused a letter containing the part of the report which affected the character of the plaintiff to be printed and forwarded to the absent shareholders: Held, first, that this letter was published on a privileged occasion, as it was the duty of the defendants to communicate to all the shareholders any part of the report of the auditors which materially affected the accounts of the company; secondly, that there was no intrinsic or extrinsic evidence of malice to be left to the jury, as the report of the auditors was published without comment, and the explanations offered to the auditors did not come before the defendants; and that causing the letter to be printed was a reasonable and necessary mode of publishing it to the absent shareholders. (n)

If a man *bonâ fide* writes a letter in his own defence, and for the defence of his rights and interests, and is not actuated by any malice, that letter is privileged, although it may impute dishonesty to another. (o)

A letter published by an attorney honestly in vindication of the character of a client against charges published and circulated against the client by the prosecutor, is privileged. (p)

Sending defamatory matter by a post-office telegram is an unauthorized publication which prevents a communication from being privileged though made *bonâ fide*, and under circumstances which otherwise would have made it privileged. (q)

Any one, in the transaction of business with another, has a right to use language *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another; and this is the principle upon which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. (r) But the privilege, which protects a communication, must result from a right to discuss the particular matter in respect of which the alleged libel is published; nothing else can be privileged. Where, therefore, remarks were made reflecting on a Roman Catholic priest at a public meeting called for the purpose

In the conduct of a man's affairs.

The privilege is confined to the right to discuss the particular matter in respect of which

(m) Cockayne v. Hodgkinson, 5 C. & P. 543, Parke, B.

(n) Lawless v. The Anglo-Egyptian Cotton and Oil Company, 38 L. J. Q. B. 129.

(o) Coward v. Wellington, 7 C. & P. 531. Littledale, J., see Whiteley v.

Adams, *infra*.

(p) R. v. Veley, 4 F. & F. 1117.

(q) Williamson v. Frere, 43 L. J. C. P. 161.

(r) Tuson v. Evans, 12 A. & E. 733. See Whiteley v. Adams, 33 L. J. C. P. 89; 15 C. B. N. S. 392.

the libel is published.

of petitioning Parliament against the grant to the Roman Catholic College at Maynooth, it was held that the speaker was not justified by the circumstance that the libel was published in the course of a *bonâ fide* discussion respecting the propriety of supporting that college. (s)

Communications made *bonâ fide*, or with a view of investigating a fact.

Although that which is written may be injurious to the character of another, yet if done *bonâ fide*, or with a view of investigating a fact, in which the party making it is interested, it is not libellous. Thus where an advertisement was published by the defendant at the instigation of A., the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A., it was holden that although the advertisement might impute bigamy to the plaintiff, yet having been published under such authority, and with such a view, it was not libellous. (t)

Or made in the proper course of a proceeding.

A communication fairly made by a person in the discharge of some public (tt) or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned, is a privileged communication. (u) And if the communication be made in the regular and proper course of a proceeding, it will not be libellous. As where a writing, containing the defendant's case, and stating that some money, due to him from the government for furnishing the guard at Whitehall with fire and candle, had been improperly obtained by a Captain C., was directed to a general officer, and the four principal officers of the Guards, to be presented to his Majesty for redress, and information was refused, on the ground that the writing was no libel, but a representation of an injury drawn up in a proper way for redress, without any intention to asperse the prosecutor; and that though there was a suggestion of fraud, yet that is no more than is contained in every bill in Chancery, which is never held libellous if relative to the subject matter. (v) So a petition addressed by a creditor of an officer in the army to the Secretary-at-War, *bonâ fide*, and with the view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. (w) A letter written to the Postmaster-General, or to the Secretary to the General Post-Office, complaining of misconduct in a postmaster, or guard of a mail, is not a libel, if it was written as a *bonâ fide* complaint to obtain redress for a grievance that the party really believed he had suffered. (x) And where the defendant, being deputy-governor of Greenwich Hospital, wrote a large volume, containing an account of the abuses of the hospital, and

(s) *Hearne v. Stowell*, 12 A. & E. 719.

(t) *Delany v. Jones*, 4 Esp. 191. *Lay v. Lawson*, 4 A. & E. 795.

(tt) *Henwood v. Harrison*, 41 L. J. M. C. 206.

(u) *Toogood v. Spyring*, 4 Tyrw. 582. 1 C. M. & R. 181. See *Spencer v. Amer-ton*, 1 M. & Rob. 470. *Warren v. Warren*, 4 Tyrw. 850. 1 C. M. & R. 150. *Wright v. Woodgate*, 2 C. M. & R. 573. 1 T. & G. 12. *Coxhead v. Richards*, 2

C. B. 569.

(v) *Rex v. Bayley*, Andr. 229, Bac. Abr. tit. *Libel* (A.) 2. As to the privilege of proceedings in courts of justice, see *ante*, p. 180.

(w) *Fairman v. Ives*, 5 B. & A. 642. See per Maule, J., in *Wenman v. Ash*, 13 C. B. 836.

(x) *Woodward v. Lander*, 6 C. & P. 548. *Alderson, B. Blake v. Pilford*, 1 M. & Rob. 198, *Taunton, J.*



treating the characters of many of the officers of the hospital (who were *public* officers), and Lord Sandwich in particular, who was First Lord of the Admiralty, with much asperity, and printed several copies of it, which he distributed to the governors of the hospital only, and not to any other person; the rule for an information was discharged. Lord Mansfield said, that this distribution of the copies to the persons only who were from their situations called on to redress these grievances, and had, from their situations, competent power to do it, was not a publication sufficient to make the writing a libel. (y) Where, however, the defendant wrote a letter to the Secretary of State, imputing to the town clerk and clerk to the justices of a borough, corruption in the latter office, it was held that this was not privileged, because the Secretary of State had no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the application. (z) But a memorial presented to the Secretary of State for the Home Department by the elector of a borough complaining of the conduct of a justice of the peace during a recent election of a Member of Parliament for the borough, and imputing that he had made speeches inciting to a breach of the peace, and praying that the secretary would cause an inquiry to be made into the conduct of the plaintiff, and that, on the allegations being substantiated, the secretary would recommend to the Queen that the justice should be removed from the commission of the peace, is a privileged communication; for though the Lord Chancellor generally is consulted as to the removal of justices of the peace, the memorial might be considered as addressed to the Queen, through the secretary, who might have caused the inquiry to be made, have communicated with the Lord Chancellor, and have, in effect, recommended the removal of the justice. (a) And where the publication is an admonition, or in the course of the discipline of a religious sect, as the sentence of expulsion from a society of Quakers, it is not libellous. (b) So a letter written by a son-in-law to his mother-in-law, containing imputations on the character of a person whom she was about to marry, and desiring a diligent and attentive inquiry into his character, if written *bonâ fide*, is a privileged communication, (c) And it has been decided, that an action will not lie for words innocently read as a story out of a book, however false and defamatory they may be. Thus, where a clergyman in a sermon recited a story out of *Fox's Martyrology*, that one G., being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth he never was so plagued, and was himself actually present at the

(y) *Rex v. Baillie*, 30 Geo. 3. Holt on Libel, 173. 1 Ridgway's Collection of Erskine's Speeches, p. 1. Lord Mansfield seemed to think that whether the paper were in manuscript or printed, under these circumstances, made no difference.

(z) *Blagg v. Sturt*, 10 Q. B. 899. This case was much considered in *Harrison v. Bush*, *infra*, and may, perhaps, be shaken by it. The cases, however, are distinguishable, as the clerk to justices of the

peace is appointed by them, and a secretary of state has no authority as to him, either directly or indirectly.

(a) *Harrison v. Bush*, 5 E. & B. 344; *Dickeson v. Hilliard*, 43 L. J. Ex. 37.

(b) *Rex v. Hart*, 2 Burn's Ecc. L. 779. The charge of a bishop to his clergy in convocation is a privileged communication. *Laughton v. The Bishop of Sodor and Man*, 42 L. J. P. C. 11.

(c) *Todd v. Hawkins*, 8 C. & P. 88, 41 L. J. Q. B. 100.

discourse; the words being delivered only as matter of history, and not with any intention to slander, it was adjudged for the defendant. (*d*)

To a declaration in an action for libel, setting out letters written of and concerning the plaintiff, the defendant pleaded, in substance, that when he wrote the letters he was the superior military officer of the plaintiff, and that it was his duty, as such superior officer, to forward to the Adjutant-General letters written by the officers under his command, and sent to him in relation to their military conduct, &c., and to make reports in writing to the Adjutant-General upon such letters for the information of the Commander-in-Chief; that he (defendant) had received such letters from the plaintiff, and had forwarded them in the ordinary course of his military duty as such superior military officer to the Adjutant-General as an act of military duty and not otherwise, and had made certain reports in writing, &c., which letters and reports were the libels complained of. To this plea the plaintiff replied that 'the said words in the declaration mentioned were written and published by the defendant of actual malice on his (the defendant's) part, and without reasonable, probable, or justifiable cause, and not *bonâ fide* or in the *bonâ fide* discharge of the defendant's duty as such superior officer, as in the said second plea alleged: 'Held, by Mellor, J., and Lush, J., that even though the words complained of were published of actual malice, and without any reasonable, probable, or justifiable cause, as alleged in the replication, yet that, inasmuch as the question raised was one purely of military cognizance, the plaintiff and the defendant being officers in the army, and both bound by the Articles of War, the plaintiff had no remedy at law: Held, by Cockburn, C. J., that the plaintiff was entitled to judgment. (*e*)

Discussing matters in which the public are interested.

The Board of Admiralty having ordered the defendant, the Queen's printer, to print a board minute relating to their proceedings in naval ship-building, which contained a letter of the Comptroller of the Navy in reference to plans of the plaintiff submitted to the board; the defendant sold copies to the public; the plaintiff brought his action of libel against the defendant, averring that a statement in such letter that the plans derived no weight from his antecedents, meant that his plans were worthless, and were calculated to injure him in his profession; no actual malice was imputed: Held, by the majority (Willes, J., Byles, J., and Brett, J.) of the Court (dissentiente, Grove, J.), that the plaintiff was rightly non-suited on the ground that every man has a right to discuss freely, if honestly and without malice, any subject in which the public are generally interested, and that what the defendant had done merely amounted to this. (*f*)

Comments by a churchwarden upon the conduct of the clergymen, in taking meals in the vestry, and in causing books to be sold in the church during service, are matters of public interest, and may lawfully be published if they do not exceed the boundaries of fair criticism. (*g*)

(*d*) Bac. Ab. *Libel* (A.) 2.

(*f*) *Henwood v. Harrison*, 41 L. J.

(*e*) *Dawkins v. Paulet*, 32 L. J. Q. B.

C. P. 206.

53. See *Dawkins v. Paulet*, 32 L. J. Q. B. 33.

(*g*) *Kelly v. Tinling*, 35 L. J. Q. B. 231.

The proper meaning of a privileged communication is this: that the occasion on which the communication was made, rebuts the inference, *primâ facie*, arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact; that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made. This may be made out either from the language of the letter itself, or by extrinsic evidence, or by proof of the conduct or expressions of the defendant, showing that he was actuated by a motive of personal ill will. (*h*) But where the publication is *primâ facie* privileged, juries ought not to look too strictly at the particular expressions used, but ought clearly to see that the letter was written with a malicious intent before they find it to be a libel. (*i*)

Proper meaning of a privileged communication.

It is matter of law for the judge to determine whether the occasion of writing or speaking criminary language repels the inference of malice, constituting what is called a privileged communication; and if at the close of the case for the prosecution there is no intrinsic or extrinsic evidence of malice, it is the duty of the judge to direct a verdict for the defendant; but wherever there is evidence of malice, either intrinsic or extrinsic, it is the duty of the judge to leave the question of express malice to the jury. (*j*) But where a communication is *primâ facie* privileged, in order to leave the question of malice to the jury, it is not enough that the facts proved are consistent with the presence of malice as well as with its absence; for actual malice must be proved, and therefore its absence must be presumed until such proof is given. (*k*) Where a letter containing defamatory words is written upon a privileged occasion, surrounding circumstances are to be considered by the judge at the trial in determining whether the words used are so much too violent for the occasion as to rebut the presumption of the absence of malice arising from the privilege of the occasion; and if from surrounding circumstances it appears that the words are capable of two constructions, one of which is compatible with the absence of malice, then the presumption of the absence of malice which existed in the first instance from the privilege of the occasion should be allowed to prevail throughout. (*l*)

It is for the judge to say whether the privilege exists, and for the jury whether there is actual malice.

### SEC. III.

#### *Publications against the Christian Religion.*

1. It has been before observed, (*m*) that blaspheming God, or turning the doctrines of the Christian religion into contempt and ridicule, is an indictable offence. At common law, all blasphemies

Of publications against the Christian religion.

(*h*) *Wright v. Woodgate*, 2 C. M. & R. 573. 1 T. & Gr. 12. See *Blake v. Pilfold*, 1 M. & Rob. 198, Taunton, J. Blagg *v. Sturt*, 10 Q. B. 899.

(*i*) *Woodward v. Lander*, 6 C. & P. 548, Alderson, B. *Todd v. Hawkins*, 8 C. & P. 88.

(*j*) *Cooke v. Wildes*, 5 E. & E. 313. *Gilpin v. Fowler*, 9 Exc. R. 615.

(*k*) *Somerville v. Hawkins*, 10 C. B. 588. *Taylor v. Hawkins*, 16 Q. B. 308. *Harris v. Thompson*, 13 C. B. 333. *Wenman v. Ash*, 13 C. B. 836; *Wason v. Walter*, 38 L. J. Q. B. 41, per Cockburn, C. J., *Hart v. Von Gumpack*, 43 L. J. P. C. 25.

(*l*) *Spence v. White*, 38 L. J. Ex. 138.

(*m*) *Ante*, p. 177.

against God, as denying His being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scripture, or exposing any part thereof to contempt or ridicule; and also seditious words in derogation of the established religion; are considered as offences tending to subvert all religion and morality, and punishable by the temporal courts with fine and imprisonment, and also infamous corporal punishment, in the discretion of the court. (*n*)

Statutes upon  
this subject.

Some provisions have also been made upon this subject by statutes. The 1 Edw. 6, c. 1, (*o*) enacts, that persons reviling the Sacrament of the Lord's Supper by contemptuous words or otherwise, shall suffer imprisonment. The 1 Eliz. c. 2, (*p*) enacts, that if any *minister* shall speak anything in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, shall for the first offence be imprisoned six months and forfeit a year's value of his benefice; for the second, shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks; for the second, 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. The 1 Will. 3, c. 18, s. 17, enacted, that whosoever should deny in his preaching or writing the doctrine of the Blessed Trinity, should lose all benefit of the Act for granting toleration. This section is now repealed by 53 Geo. 3, c. 160: but while it was in existence it was considered as operating to deprive the offender of the benefit therein mentioned, leaving the punishment of the offence as for a misdemeanor at common law. (*q*) The 9 & 10 Will. 3, c. 32, enacted, that if any person, educated in or having made profession of the Christian religion, should, by writing, printing, teaching, or advised speaking, deny any one of the Persons in the Holy Trinity to be God, (*r*) or should assert or maintain there are more gods than one, or should deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he should upon the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and should suffer three years' imprisonment without bail. (*s*) A person offending under this statute was held to be also indictable at common law. (*t*) And

(*n*) See *ante*, p. 177, and the cases collected in 1 Hawk. P. C. c. 5. Gathercole's case, 2 Lewin, 287.

(*o*) Repealed by 1 Mary, c. 2, and revived by 1 Eliz. c. 1.

(*p*) Partly repealed by the 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59, but not so as to affect the provisions here mentioned.

(*q*) By Lord Kenyon in *Rex v. Williams*, 1797. *Holt on Libel*, 66.

(*r*) Repealed by 1837 Geo. 3, c. 119.

s. 2, 'so far as the same relates to persons denying as therein mentioned respecting the Holy Trinity.'

(*s*) But the delinquent publicly renouncing his error in open court, within four months after the first conviction, is to be discharged for that once from all disabilities.

(*t*) *Barnard*, 162. 2 Str. 834. *Fitzgib.* 64. *Rex v. Williams*, 1797. *Rex v. Caton*, 1812.

where a motion was made in arrest of judgment on an information for a blasphemous libel, on the ground that this statute had put an end to the common law offence : the Court were clear that it had not, considering that the provisions of the statute were cumulative. (*u*).

Upon the trial of an information against the defendant for uttering expressions grossly blasphemous, Hale, C. J., observed, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the Court of King's Bench. That to say religion is a cheat is to dissolve all those obligations whereby civil society is preserved ; that Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law. (*v*) In a case where a libel stated that Jesus Christ was an impostor, a murderer in principle, and a fanatic, a juryman asked whether a work denying the divinity of our Saviour was a libel ; and Abbott, C. J., answered that a work speaking of Jesus Christ in the language here used was a libel ; and on a motion for a new trial, on the ground that this was a wrong answer, the Court without difficulty held that the answer was right. (*w*)

To reproach the Christian religion is to speak in subversion of the law.

Where the defendant had been convicted for publishing several blasphemous libels, in which the miracles of our Saviour were turned into ridicule and contempt, and his life and conversation calumniated, it was moved in arrest of judgment that this was not an offence within the cognizance of the temporal courts at common law ; but the Court would not suffer the point to be argued, saying that the Christian religion, as established in this kingdom, is part of the law ; and, therefore, that whatever derided Christianity derided the law, and consequently must be an offence against the law. (*x*) It was also moved in arrest of judgment, that as the intent of the book was only to show that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking Christianity in general, but only as striking against one received proof of His being the Messiah ; to which the Court said, that the attacking Christianity in the way in which it was attacked in this publication was destroying the very foundation of it ; and that, though there were professions in the book that its design was to establish Christianity upon a true bottom by considering these narrations in Scripture as emblematical and prophetical, yet that such professions were not to be credited, and that the rule is *allegatio contra factum non est admittenda*. But the Court also said, that though to write against Christianity *in general* is clearly an offence at common law, they laid stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points ; and, in delivering the judgment of the Court, Raymond, C. J., said, 'I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity itself is struck at.' (*y*)

The Christian religion is part of the law of the land.

But though to write against Christianity in general is an offence at common law, the Court will not meddle with differences of opinion upon controverted points.

The doctrine of the Christian religion constituting part of the

The dread of

(*u*) *Rex v. Carlisle*, 3 B. & A. 161.

(*x*) *Rex v. Woolston*, Barnard, 162.

(*v*) *Rex v. Taylor*, Vent. 293. 3 Keb.

2 Str. 834. Fitzgib. 64.

607.

(*w*) *Rex v. Waddington*, 1 B. & C. 26.

(*y*) *Rex v. Woolston*, Fitzgib. 66.

future punishment is one of the principal sanctions of the law.

law of the land was recognized in a later case, where the judgment of the Court of King's Bench was pronounced upon a person convicted of having published a very impious and blasphemous libel, called *Paine's Age of Reason*. (z) Ashhurst, J., said, that although the Almighty did not require the aid of human tribunals to vindicate His precepts, it was, nevertheless, fit to show our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that it was upon this ground that the Christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and His holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments. (a)

Rational and dispassionate discussions are allowable.

Contumely and contempt are what no establishment can tolerate: but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship. (b) A sensible writer upon the subject of libel says, as to this point—'that it may not be going too far to infer, from the principles and decisions, that no author or preacher who fairly and conscientiously promulgates the opinions with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal; but a malicious and mischievous intention is in such case the broad boundary between right and wrong; and that if it can be collected, from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguishing between different degrees of evil tendency, if the matter published contain any such tendency, the publisher becomes amenable to justice.' (c)

Where a defendant was charged with publishing a libel upon a religious order, consisting of females, professing the Roman Catholic faith, called the Scorton Nunnery, Alderson, B., observed, a person may, without being liable to prosecution for it, attack Judaism or Mahomedanism, or even any sect of the Christian religion, save the established religion of the country; and the only reason why the latter is in a different situation from the other is, because it is the form established by law, and is therefore a part of the constitution of the country. For the same reason any general attack on Christianity is the subject of a criminal prosecution, because Christianity is the established religion of the country. Any person has a right to entertain his opinions, to express them, to discuss the subject of the Roman Catholic religion, and its institutions; but *he has no right in so doing to attack the characters of individuals.* (d)

(z) This libel was of the worst kind, attacking the truth of the Old and New Testaments; arguing that there was no genuine revelation of the will of God existing in the world; and that reason was the only true faith which laid any obligations on the conduct of mankind. In other respects also it ridiculed and vilified the prophets, our Saviour, His

disciples, and the Sacred Scriptures.

(a) *Rex v. Williams*, 1797. Holt on Libel, 69, note (e). 2 Starkie on Libel, 141.

(b) 4 Blac. Com. 51.

(c) Starkie on Libel, 1st edit. 496, 497. See 2nd edit., vol. 2, 146-7.

(d) Gathercole's case, 2 Lewin, 237.

As to the extent of this offence and the nature and certainty of the words, it appears to be immaterial whether the publication is oral or written; though the committing mischievous matter to print or writing, and thereby affording it a wider circulation, would undoubtedly be considered as an aggravation, and affect the measure of punishment. (e)

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#### SEC. IV.

##### *Publications against Morality.*

When the Star Chamber had been abolished, it appears that the Court of King's Bench came to be considered as the *custos morum*, having cognizance of all offences against the public morals; (f) under which head may be comprehended representations whether by writing, picture, sign, or substitute, tending to vitiate and corrupt the minds and morals of the people. (g) Formerly, indeed, it appears to have been holden that publications of this kind were not punishable in the temporal courts: (h) but a different doctrine has since been established: (i) And in late times indictments for obscene writings and prints have frequently been preferred, without any objection having been made to the jurisdiction of the temporal courts.

Of publications  
against  
morality.

The principle of the cases upon this subject seems to comprehend oral communications, when made before a large assembly, and when there is a clear *tendency* to produce immorality, as in the case of the performance of an obscene play. (j)

Oral communi-  
cations.

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#### SEC. V.

##### *Libels against the Constitution.*

Libels against the constitution, abstracted from all personal allusions, do not appear, either in ancient or modern times, to have been often made the subject of legal inquiry. In general, publications upon the constitution, avoiding all discussions of personal rights and privileges, are speculative in their nature, and not calculated to generate popular heat. But if they should be of a different description, tending to degrade and vilify the constitution, to promote insurrection, and circulate discontent through its members, they would, without doubt, be considered as seditious and criminal. (k)

Of publications  
against the  
constitution.

Thus it appears to have been adjudged, that though no indictment lay for saying that the laws of the realm were not the laws of God, because true it is that they are not the laws of God; yet that

(e) 2 Starkie on Libel, 144, 2nd edit.

(f) Sir Ch. Sedley's case, 1663. Keb. 720. 2 Str. 790. Sid. 168.

(g) Holt on Libel, 73.

(h) Rex v. Read, 11 Mod. 142. 1 Hawk.

P. C. c. 73, s. 9.

(i) Rex v. Curl, 2 Str. 788. Rex v. Wilks, 4 Burr. 2527.

(j) 2 Starkie on Libel, 159. In Rex v. Curl, 2 Str. 790, it was stated that there had been many prosecutions against the players for obscene plays, but that they had interest enough to get the proceedings stayed before judgment.

(k) Holt on Libel, 86.

it would be otherwise to say that the laws of the realm are contrary to the laws of God. (l) And a defendant was convicted on an information charging him with having published, concerning the government of England and the traitors who adjudged King Charles the First to death, that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. (m) In another case a person was convicted for publishing a libel, in which it was suggested that the revolution was an unjust and unconstitutional proceeding, and the limitation established by the Act of Settlement was represented as illegal, and that the revolution and settlement of the crown as by law established had been attended with fatal and pernicious consequences to the subjects of the kingdom. (n)

## SEC. VI.

### *Libels against the King.*

Of publications  
against the  
King.

Though a different construction may have prevailed in more arbitrary times, it is now settled that bare words, not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not in themselves overt acts of high treason; but only a misprision, punishable at common law by a fine and imprisonment, or other corporal punishment. (o) Though words may expound an overt act, and show with what intent it was done. (p) And, generally speaking, any words, acts, or writing tending to vilify or disgrace the King, or to lessen him in the esteem of his subjects, or any denial of his right to the crown, even in common and unadvised discourse, amount at common law to a misprision punishable by fine and imprisonment. (q)

Statutes.

There are also some legislative provisions upon this subject. The 3 Edwd. 1, c. 34, enacts, that none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the King and his people, and the great men of the realm. (r) And with a view to the security of the succession of the House of Hanover, according to the Act of Settlement, a law was passed declaring it to be treason to write or print against it. (s)

The nature of the offence of libel against the monarch personally has been ably explained and illustrated, according to the more mild and liberal doctrines of the present time, in the following case:—

(l) 2 Roll. Abr. 78.

(m) *Rex v. Harrison*, 1677. 3 Keb. 841. Vent. 324. And a treatise upon hereditary right was holden to be a libel, though it contained no reflection upon any part of the then government, *Reg. v. Bedford*, 1711. 2 Str. 789. Gilb. 297.

(n) *Rex v. Nutt*, 1754. Dig. L. L. 126, and see Dr. Shebbeare's case, and *Rex v. Paine*, Holt on Libel, 88, 89, and 2 Starkie on Libel, 164.

(o) 1 East, P. C. 246.

(p) *Crohagan's case*, Cro. Car. 332.

(q) 4 Blac. Com. 123.

(r) It is said to have been resolved by all the judges that all writers of false news are indictable and punishable (4 Read. St. L. Dig. L. L. 23); and probably at this day the fabrication of news likely to produce any public detriment would be considered as criminal. Starkie on Libel, 546, 1st edit.

(s) 6 Anne, c. 7; and see other statutes which were passed for the purpose of guarding the King's character and dignity, cited in 2 Starkie on Libel, 171, 2nd edit.



The defendant was charged with having published a libel to the following effect: 'What a crowd of blessings rush upon one's mind, that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular.' Lord Ellenborough, C. J., in addressing the jury, stated, that the first sentence of this passage would easily admit of an innocent interpretation; that the fair meaning of the expression 'change of system' was a change of political system—not a change in the frame of the established government—but in the measures of policy which had been for some time pursued; and that by total change of system was certainly not meant *subversion* or *demolition*, the descent of the crown to the successor of his Majesty being mentioned immediately after. His lordship then proceeded:—'If a person who admits the wisdom and virtues of his Majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his Majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step further, and say or insinuate that his Majesty acts from any partial or corrupt view or with an intention to favour or oppress any individual or class of men, and it would become most libellous.' Upon the second sentence, after stating that it was more equivocal, and telling the jury that they must determine what was the fair import of the words employed, not in the more lenient or severe sense, but in the sense fairly belonging to them, and which they were intended to convey, Lord Ellenborough proceeded: 'Now do these words mean, that his Majesty is actuated by improper motives, or that his successor may render himself nobly popular by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But if the passage only means that his Majesty, during his reign, or any length of time, may have taken an imperfect view of the interests of the country, either respecting our foreign relations, or the system of our internal policy; if it imputes nothing but honest error, without moral blame, I am not prepared to say that it is a libel.' And again, towards the conclusion of his address, his lordship said, 'The question of intention is for your consideration. You will not distort the words, but give them their application and meaning as they impress your minds. What appears to me most material is the substantive paragraph itself; (t) and if you consider it as meant to represent that the reign of his Majesty is the only thing interposed between the subjects of this country and the possession of great blessings which are likely to be enjoyed in the reign of his successor, and thus to render his Majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If on the contrary you do not see that it means

*Rex v. Lambert.* It is not libellous for a writer who allows the sovereign to be solicitous for the welfare of his subjects, and who has no intention of calumniating him, or of bringing his personal government into public odium, to express regret that he has taken an erroneous view of any question of foreign or domestic policy.

(t) The libel was published in a newspaper; and it had been allowed to the defendant to have read in evidence an extract from the same paper connected with the subject of the passage charged as libellous, although disjoined from it by extraneous matter, and printed in a different character.

distinctly, according to your reasoning, to impute any purposed maladministration to his Majesty, or those acting under him, but may be fairly construed as an expression of regret, that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men.' (*u*)

Falsely publishing that the King is labouring under mental derangement is a libel: it tends to unsettle and agitate the public mind, and to lower the respect due to the King. (*v*)

## SEC. VII.

### *Libels against Houses of Parliament.*

Of publications  
against the  
two Houses of  
Parliament.

The two Houses of Parliament are an essential part of the constitution, and entitled to reverence and respect, on account of the important public duties which they have to discharge. But as they have the power of treating libels against them as breaches of their privileges, and vindicating them in the nature of contempts, more cases of such libels are to be met with in their journals than in the proceedings of the courts of law. The common law, however, is fully capable of taking cognizance of any publications reflecting in a libellous manner upon the members or proceedings of the Houses of Parliament; (*w*) and it seems rather to have been the inclination of Parliament in modern times to direct prosecutions for such offences in the courts of common law, and to waive the exercise of their own extensive privileges. In the case of the *King v. Stockdale*, (*x*) the attorney-general in his speech to the jury, after stating the address of the House of Commons to the King, praying that his Majesty would direct the information to be filed, proceeded thus, 'I state it as a measure which they have taken, thinking it in their wisdom, as every one must think it, to be the fittest to bring before a jury of their country an offender against themselves, avoiding thereby, what sometimes indeed is unavoidable, but which they wish to avoid whenever it can be done with propriety, the acting both as judges and accusers, which they must necessarily have done, had they resorted to their own powers, which are great and extensive, for the purposes of vindicating themselves against insult and contempt, but which in the present instance they have wisely forborne to exercise, thinking it better to leave the offender to be dealt with by a fair and impartial jury.' (*y*)

(*u*) *Rex v. Lambert*, 2 Camb. 398.

(*v*) *Rex v. Harvey*, 2 B. & C. 257, and malice will be implied from such wilful defaming without excuse. See the case, *post*, p. 222.

(*w*) As in *Rex v. Rayner*, 2 Barnard, 293, where the defendant was convicted of printing a scandalous libel on the Lords and Commons; and in *Rex v. Owen*, 25 Geo. 2. MS. Dig. L. L. 67. In *Rex v. Stockdale*, 28 Geo. 3, an information was filed by the attorney-general for a libel upon the House of Commons. A prosecution was also instituted in *Rex v. Reeves*, 36 Geo. 3, in consequence of a resolution

of the House of Commons, declaring a pamphlet, published by the defendant, to be a libel. In the pamphlet, which was called 'Thoughts on the English Government,' there was this passage amongst others which the House deemed libellous — 'That the King's government might go on if the Lords and Commons were lopped off.' The jury considered the expressions as merely metaphorical, and acquitted the defendant.

(*x*) *Ante*, note (*w*).

(*y*) See 2 Ridgway's speeches of the Hon. T. Erskine, p. 208.

## SEC. VIII.

*Libels upon the Government.*

The extent to which the measures of the King, or the proceedings of his government, may be fairly and legally canvassed, has been the subject of much discussion, as it is undoubtedly one of the first importance: but it is not within the scope and design of this Treatise to enter further upon the question, than by stating a few of the established principles and decided cases.

Of publications  
against the  
government.

It may be observed, that the liberty of discussion, which in many instances has been admitted on the part of the officers of the crown, would seem to be sufficient to answer all the purposes of the honest patriot; the man who would condemn only with a view to genuine and constitutional reformation. Upon a late prosecution for a libel, the attorney-general in his opening to the jury thus expressed himself: 'The right of every man to represent what he may conceive to be an abuse or grievance in the government of the country, if his intention in so doing be honest, and the statement made upon fair and open grounds, can never for a moment be questioned. I shall never think it my duty to prosecute any person for writing, printing, and publishing, fair and candid opinions on the system of the government and constitution of this country, nor for pointing out what he may honestly conceive to be grievances, nor for proposing legal means of redress.' (z) Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper go beyond that limit, and be calculated to excite tumult, it is a libel. (a)

In many cases which may occur, the due exercise of this liberty and right of discussion will involve considerations of much difficulty, and require great nicety of discrimination; as it may become necessary to ascertain the particular points at which the bounds of rational discussion have been exceeded. The answer to the following question has, however, been proposed as a test, by which the intrinsic illegality of such publications may be decided: (b) 'Has the communication a plain tendency to produce public mischief by perverting the mind of the subject, and creating a general dissatisfaction towards government?'

However innocent and allowable it may be to canvass political measures within these limits, it is quite clear that their discussion must not be made a cloak for an attack upon private character. Libels on persons employed in a public capacity receive an aggravation as they tend to scandalize the government by reflecting on

(z) *Rex v. Perry*, 1793. See 2 *Ridgway's speeches*, 371.

(a) *Rex v. Collins*, 9 C. & P. 456. *Littledale, J.*

(b) *Starkie on Libel*, 525, 1st edit.

those who are entrusted with the administration of public affairs ; for they not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned to acts of revenge, but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. (c) If a paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel. (d)

Cases. A person delivered a ticket up to the minister after sermon, wherein he desired him to take notice that offences passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c. ; and this was held to be a libel, though no magistrate in particular was mentioned, and though it was not averred that the magistrates suffered those vices knowingly. (e)

Reg. v. Tuchin. In a case where the defendant was prosecuted upon an information for a libel upon the government, his counsel contended that the publication was innocent, and could not be considered as libellous, because it did not reflect upon particular persons. But Holt, C. J., said, 'They say nothing is a libel but what reflects on some particular person. But this is a very strange doctrine to say that it is not a libel reflecting on the government, endeavouring to possess the people that the government is maladministered by corrupt persons that are employed in such stations, either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If men should not be called to account for possessing the people with an ill opinion of the government, no government can subsist ; nothing can be worse to any government than to endeavour to procure animosities as to the management of it ; this has always been looked upon as a crime, and no government can be safe unless it be punished.' (f)

Rex v. Cobbett. This doctrine was recognized in a case, where the defendant was charged with publishing a libel upon the administration of the Irish government, and upon the public conduct and character of the Lord Lieutenant and Lord Chancellor of Ireland. Lord Ellenborough, C. J., in his address to the jury, observed, 'It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime ; it has ever been considered as a crime, whether wrapt in one form or another. The case of *Reg. v. Tuchin*, decided in the time of Lord Chief Justice Holt, has removed all ambiguity from this question ; and, although at the period when that case was decided great political contentions existed, the matter was not again brought before the judges of the Court by any application for a new trial.' And afterwards his lordship said, 'It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the government. But, gentle-

(c) 1 Hawk. P. C. c. 73, s. 7. Bac. Little Dale, J.  
 Abr. tit. *Libel* (A.) 2. Rex v. Franklin, (e) Bac. Abr. tit. *Libel* (A.) 2.  
 9 St. Tri. 255. (f) Reg. v. Tuchin, 1704. Holt's R.  
 (d) Reg. v. Lovell, 1702. 123, 5 St. Tri. 532.

men, we must confine ourselves within limits. If in so doing individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation.' (g)

## SEC. IX.

### *Libels on Magistrates and Administration of Justice.*

As nothing tends more to the disturbance of the public weal than aspersions upon the administration of justice; contempts against the King's judges, and scandalous reflections upon their proceedings, have always been considered as highly criminal offences; and one of the earliest cases of libel appears to have been an indictment for an offence of this kind. (h)

Of publications against magistrates and the administration of justice.

Generally, any contemptuous or contumacious words spoken to the judges of any courts in the execution of their offices are indictable; and when reflecting words are spoken of the judges of the superior courts at Westminster, the speaker is indictable both at common law and under the statutes of *scandalum magnatum*, whether the words relate to their office or not. (i)

Any publications reflecting upon and calumniating the administration of justice are of a libellous nature. (j) So an order made by a corporation, and entered in their books, stating that A. (against whom a jury had found a verdict with large damages in an action for a malicious prosecution, and which verdict had been confirmed in the Court of Common Pleas,) was actuated by motives of public justice in preferring the indictment, was held to be a libel reflecting on the administration of justice, for which an information should be granted against the members who had made the order. Ashhurst, J., said, that the assertion that A. was actuated by motives of public justice carried with it an imputation on the public justice of the country; for if those were his only motives, then the verdict must be wrong. Buller, J., said, 'Nothing can be of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made on courts of justice in this country. They can be of no service, and may be attended with the most mischievous consequences. Cases may happen in which the judge and jury may be mistaken: when they are, the law has afforded a remedy; and the party injured is entitled to pursue every method which the law allows to correct the mistake. But when a person has recourse either by a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of

Cases.

Rex v. Watson.

(g) Rex v. Cobbett, 1804. Holt on Libel, 114, 115. 2 Starkie on Libel, 193, where see in the note other cases referred to.

(h) Holt on Libel, 153.

(i) 2 Starkie on Libel, 195, where see the cases collected. And see 1 Hawk. P. C. c. 7, *et seq.* The proceeding by writ of *scandalum magnatum* upon the statutes 3 Edw. 1, c. 34. 2 R. 2, st. 1, c. 5. 12 R. 2, c. 11, is of a civil, as well

as of a criminal nature; and was formerly had recourse to in case of defamation of any of the great officers and nobles. But the civil proceeding is now almost obsolete, the nobility preferring to waive their privileges in any action of slander, and to stand upon the same footing, with respect to civil remedies, as their fellow subjects.

(j) Vin. Abr. tit. *Contempt* (A.) 44. Pool v. Sacheverell, 1720.

justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the constitution itself' (k)

Rex v. White.

In another case the same doctrine was acted upon: but it was at the same time clearly admitted that it would be lawful to discuss the merits of the verdict of a jury, or the decisions of a judge, provided it be done with candour and decency. An information was filed against the proprietors and printers of a Sunday newspaper, for a libel upon Le Blanc, J., and a jury, by whom a prisoner had been tried for murder and acquitted; and it was contended on the part of the defendants that they had only made a fair use of their right to canvass the proceedings of a court of justice. Grose, J., said, that 'it certainly was lawful, with decency and candour, to discuss the propriety of the verdict of a jury, or the decisions of a judge; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal: but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspaper, set out in the information, contained no reasoning or discussion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country.' (l)

Of words  
spoken of, or  
to, inferior  
magistrates.

It seems that no indictment will lie for contemptuous words spoken either of or to inferior magistrates, unless they are at the time in the actual execution of their duty, or at least unless the words affect them directly in their office; though it may be good cause for binding the offender to his good behaviour. (m) This doctrine was recognized in a case, where the defendant was indicted for saying of a justice of the peace for the county of Middlesex, in his absence, that he was a *scoundrel and a liar*. (n) Lord Ellenborough, C. J., said, 'the words not being spoken to the justice, I think they are not indictable. This doctrine is laid down by Lord Holt in a case in *Salkeld*; (o) and in *Rex v. Pocock* (p) the Court of Queen's Bench refused to grant an information for saying of a justice, in his absence, that he was a *forsworn rogue*. However, I will not direct an acquittal upon this point, as it is upon the record, and may be taken advantage of in arrest of judgment. It will be for the jury now to say whether these words were spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity; for if they were not, this indictment is not supported; and it could not by possibility be a misdemeanor to utter them, although the prosecutor's name may be in the commission of the peace for the county of Middlesex.' (q) But it has been holden to be an indictable offence to say of a justice of the peace, when *in the execution of his office*, 'you are a rogue and a liar.' (r) The Court will not, however, grant an information for calling a magistrate a liar,

(k) *Rex v. Watson*, 2 T. R. 199.

(l) *Rex v. White*, 1 Campb. 359. And see a note of another proceeding by information against the same defendants for a libel on Lord Ellenborough, C. J. Holt on Libel, 170, 171.

(m) 2 Starkie on Libel, 193. 1 Hawk.

P. C. c. 21, s. 13.

(n) *Rex v. Weltje*, 2 Campb. 142.

(o) *Rex v. Wrightson*, 2 Salk. 698.

(p) 2 Str. 1167. And see *Rex v. Penny*, 1 Lord Raym. 153.

(q) *Rex v. Weltje*, 2 Campb. 142.

(r) *Rex v. Revel*, 1 Str. 420.

accusing him of misconduct in having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless they tend to a breach of the peace. (s)

## SEC. X.

*Libels on Private Individuals.*

A general definition of a libel on an individual has already been given, *ante*, p. 178.

As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which to some men is more dear than life itself; it has been held that not only charges of a flagrant nature, and which reflect a moral (t) turpitude on the party, are libellous, but also such as set him in a scurrilous, ignominious, or ludicrous (u) light, whether expressed in printing or writing, or by signs or pictures; for these equally create ill blood, and provoke the parties to acts of revenge and breaches of the peace. (v)

Of publications against private individuals.

But it should be observed, that there is an important distinction under this head between words *spoken* only, and words published by writing or printing. Words spoken, however scurrilous, even though spoken personally to an individual, are not the subject of indictment, unless they directly tend to a breach of the peace, as if they convey a challenge to fight. (w) But words, though not scandalous in themselves, if published in writing, and tending in any degree to the discredit of a man, have been held to be libellous. (x)

Words spoken are not indictable.

Upon these principles it has been held to be libellous to write of a man that he had the itch, and stunk of brimstone. (y) And an information was granted against the mayor of a town for sending to a nobleman a license to keep a public house. (z) An information was also granted for a publication reflecting upon a person who had been unsuccessful in a lawsuit; (a) and against

Cases.

(s) *Ex parte Chapman*, 4 A. & E. 773.

(t) A charge of ingratitude is actionable as libel, *Cox v. Lee*. 38 L. J., Ex. 219.

(u) *Cooke v. Ward*, 6 Bing. 409. 4 M. & P. 99.

(v) *Ante*, p. 178. Bac. Abr. tit. *Libel* (A.) 2. So in the case of *Thorley v. Lord Kerry*, 4 Taunt. 364, Mansfield, C. J., delivering the opinion of the Court, said, 'there is no doubt that this is a libel for which the plaintiff in error might have been indicted and punished, because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies.' And in *Rex v. Cobbett*, Holt on

*Libel*, 114, 115, Lord Ellenborough, C. J., said, 'No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals, or of society, be interrupted, or even exposed by types and figures, the act, by the law of England, is a libel.'

(w) *Reg. v. Langley*, 6 Mod. 125. *Rex v. Bear*, 2 Salk. 417. By Holt, C. J. *Villars v. Monsley*, 2 Wils. 403, and see 2 Starkie on *Libel*, 208. *Thorley v. Lord Kerry*, 4 Taunt. 355.

(x) Bac. Abr. tit. *Libel* (A.) 2. *Fray v. Fray*, 34 L. J. C. P. 45.

(y) *Villars v. Monsley*, 2 Wills. 403.

(z) *The Mayor of Northampton's case*, 1 Str. 422.

(a) *12 B. & C. 121*.

the printer of a newspaper for publishing a ludicrous paragraph, giving an account of the marriage of a nobleman with an actress, and of his appearing with her in the boxes with jewels, &c. (b) A defendant was convicted for publishing a libel in a review, tending to traduce, vilify, and ridicule an officer of high rank in the navy; and to insinuate that he wanted courage and veracity; and to cause it to be believed that he was of a conceited, obstinate, and incendiary disposition. (c) And an information was granted against a printer of a newspaper, for publishing a paragraph containing a libel on the Bishop of Derry, by representing him as a bankrupt. (d) But in an action for publishing a libel by posting it on a paper in the Casino-room at Southwold, containing these words, 'The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room;' the Court of Exchequer held, that the publication was not a libel, as it did not affect the moral character of the plaintiffs, nor state that they were not proper persons for general society; that the paper might import no more than that the plaintiff was not a social and agreeable character in the intercourse of common life. (e) But where a count alleged that the defendant published of the Duke of Brunswick the following libel: 'Why should Theophilus be surprised at anything Mrs. W. does? If she chooses to entertain the Duke of Brunswick, she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all the *expatriated* foreigners who crowd our streets to her table, if she thinks fit;' the Court of Exchequer Chamber held that the matter stated was libellous, as it might be understood in such a sense as to be injurious to the prosecutor's character.' (f)

Publication reflecting upon a man in respect of his trade.

A publication reflecting upon a man in respect of his trade may also be libellous; as where A., a gunsmith, published in an advertisement that he had invented a short kind of gun, that shot as far as others of a longer size, and that he was gunsmith to the Prince of Wales; and B., another gunsmith, counter-advertised, 'That whereas, &c. (reciting the former advertisement), he desired all gentlemen to be cautious, for that the said A. durst not engage with any artist in town, nor ever did make such an experiment, except out of a leather gun, as any gentleman might be satisfied at the Cross Guns in Long Acre, the said B.'s house.' The Court held, that though B., or any other of the trade, might counter-advertise what was published by A., yet it should have been done without any general reflections on him in the way of his business: that the advice to 'all gentlemen to be cautious,' was a reflection upon his honesty; and the allegation that he would not engage with an artist was setting him below the rest of his trade, and calling him a bungler in general terms; and that the expression 'except out of a leather gun' was charging him with a lie, the

(b) *Rex v. Kinnersley*, 1 Blac. R. 294. It was sworn that the nobleman was a married man; and the Court said, that under such circumstances the publication would have been a high offence even against a commoner, and that it was high time to stop such publications.

private families.

(c) *Rex v. Dr. Smollet*, 1759. Holt on Libel, 224.

(d) Anonymous, Hill, T. 1812.

(e) *Robinson v. Jermyn*, 1 Price, R. 11.

(f) *Gregory v. The Queen*, 15 Q. B.



word *gun* being vulgarly used for a *lie*, and *gunner* for a *liar*, and that therefore these words were libellous. (*g*)

Declaration, 'that the plaintiffs carried on the business of manufacturers of bags, and in such business invented, manufactured, and sold great numbers of a bag called "The Bag of Bags," and the defendant maliciously printed and published of and concerning the plaintiffs in their business, in a periodical called the *Tomahawk*, the words following:—"Novelty and enough. Let us [meaning the defendant] premise our remarks that they are not a planned advertisement, and then let us declare that Messrs. J. & K. [meaning the plaintiffs] have introduced and largely advertised an article of their manufacture as the Bag of Bags. As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All this it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public *ad nauseam*.'" Held, on demurrer, by the majority of the Court (Mellor, J., and Hannen, J.), that the declaration was good, on the ground that it was a question for the jury whether the article did not exceed the limits of fair criticism, and tend to disparage the plaintiffs to the public in respect to their mode of carrying on their business; but by Lush, J., that the declaration was bad, and that there was no evidence of a libel for the jury, as there was nothing in the article which conveyed an imputation on the character of the plaintiffs, or on the manner in which they conducted their business. (*h*)

General imputations upon a body of men are indictable, though no individuals may be pointed out. (*i*) An information was prayed against the defendant for publishing a paper containing an account of a murder committed upon a Jewish woman and her child, by certain *Jews* lately arrived from Portugal, and living near Broad Street, because the child was begotten by a Christian. (*j*) It was objected that no information should be granted in this case, because it did not appear who in particular the persons reflected on were. (*k*) But the Court said, that admitting that an information for a libel might be improper, yet the publication of this paper was deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders amongst the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible. (*l*) And if some of the individuals affected by the libel are specified, it will be sufficient; as where it was objected that the names of certain trustees, who were part of the body prosecuting, were not mentioned, Lord Hardwicke observed, that though there were authorities where, in cases of libel upon

General imputations upon a body of men are indictable.

(*g*) *Harman v. Delany*, Barnard, K. B. 289. Fitzgib. 121. 2 Str. 898, S. C. See *The Western Counties Manure Company v. Lawes Chemical Manure Company*, 43 L. J. Ex. 171.

(*h*) *Jenner and another v. A'Beckett*, 41 L. J. Q. B. 14.

(*i*) *Ante*, p. 179.

(*j*) The affidavit set forth that several persons therein mentioned, who were re-

cently arrived from Portugal, and lived in Broad Street, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more.

(*k*) *Rex v. Orme*, 3 Salk. 224. 1 Lord Raym. 486, was cited.

(*l*) *Rex v. Osborne*, Sess. Cas. 260. 2 Bynum, 183, 166. Kel. 230, pl. 183.

persons in their private capacities, it had been holden necessary that some particular person should be named, this was never carried so far as to make it necessary that every person injured by such libel should be specified. (*m*)

Where a publication stated that, upon the death of her late Majesty, none of the bells of the several churches of Durham were tolled; and ascribed this omission to the clergy, and then proceeded to make some very severe observations on that body, a criminal information was granted. (*n*)

Libel upon a person deceased.

A malicious defamation of one who is dead, if published with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, will be libellous; but it has been holden that an indictment for a libel, reflecting on the memory of a deceased person, cannot be supported, unless it state that it was done with a design to bring contempt on his family, or to stir up the hatred of the King's subjects against his relations, and to induce them to break the peace in vindicating the honour of the family. (*o*)

## SEC. XI.

### *Libels on Foreigners of Distinction.*

Of publications against foreigners of distinction.

Upon the ground that malicious and scurrilous reflections upon those who are possessed of rank and influence in foreign states may tend to involve this country in disputes and warfare, it has been held that publications tending to degrade and defame persons in considerable situations of power and dignity in foreign countries may be treated as libels. Thus an information was filed, by the command of the Crown, for a libel on a French ambassador, then residing at the British court, consisting principally of some angry reflections on his public conduct, and charging him with ignorance in his official capacity, and with having used stratagem to supplant and depreciate the defendant at the court of Versailles. (*p*) And Lord George Gordon was found guilty upon an information for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction: upon which occasion Ashhurst, J., observed, in passing sentence, that the object of the publication being to rekindle animosities between England and France by the personal abuse of the sovereign of one of them, it was highly necessary to repress an offence of so dangerous a nature: and that such libels might be supposed to have been made with the connivance of the state where they were published, unless the authors were subjected to punishment. (*q*) So a defendant was found guilty upon an information charging him with having published the following libel: 'The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has lately passed an edict to prohibit the exportation of deals and other naval stores. In con-

(*m*) *Rex v. Griffin and others*, Holt on Libel, 239.

(*n*) *Rex v. Williams*, 5 B. & A. 597.

(*o*) *Rex v. Topham*, 17 B. 526.

(*p*) *Rex v. D'Eon*, 1 Black. Rep. 510. The defendant was convicted.

(*q*) *Rex v. Lord George Gordon*, 1787.

sequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without freight. (r)

And in a case where the defendant was charged by an information with a libel upon Napoleon Buonaparte, Lord Ellenborough, C. J., in his address to the jury, said, 'I lay it down as law, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly when it has a tendency to interrupt the pacific relations between the two countries.' (s)

## SEC. XII.

### *Indictment for Libel.*

Having stated the different sorts of publications for which a party may be found guilty of libel, we may mention some of the points relating to the indictment on a prosecution for this offence.

An indictment for a libel must import to whom the libellous matter referred: and stating that the libel was published to defame and vilify J. S., and to bring him into disgrace, and concluding that it was to the great scandal and disgrace of J. S., is not sufficient to show that the libellous matter referred to J. S. An indictment stated that the defendant intended to vilify W. S., Mayor of Colchester, and a justice; and in order to cause it to be believed that W. S., as such mayor, had been guilty of great abuse in granting an ale-licence to J. L., and in order to bring him into great disgrace, published a certain scandalous libel, in which said libel was contained, &c., and the libel stated a speech supposed to have been made before the borough magistrates by a fictitious character, called Excise, who was supposed to lay before them a case of gross corruption, sanctioned by the mayor (*innuendo* the said W. S.) to the great scandal, injury, and disgrace of the said W. S. The usual allegation, that the libellous matter was of and concerning W. S. was omitted; and, on account of this omission, the judgment was arrested. (t) Where a count alleged that the defendant published of and concerning the Duke of Brunswick the following libel: 'the evidence to facts in relation to the particular subject alluded to is procuring; and we have no doubt sufficient information will be obtained for a strong case to lay before the Home Secretary, to enable that functionary to cause it to be intimated to the suspected party (meaning the said duke) that his presence here can be dispensed with, as it may be attended with danger to himself,' thereby meaning and intending to have it believed that the said duke was suspected of having committed and had committed some crime which would bring his life into danger from the laws of England; the count was held bad on error, be-

Indictment.

(r) *Rex v. Vent*, 1801.

(s) *Rex v. Peltier*. Holt on Libel, 78. 2 Starkie on Libel, 218. The defendant was convicted, but never was called upon to receive the judgment of the Court. Shortly after the trial, war broke out between Great Britain and France.

(t) *Rex v. Marsden*, 4 M. & S. 164. Lord Ellenborough said, that if by inevitable construction no other person could have been intended but W. S., he should have been inclined to support the indictment; but that did not appear. *Clement v. Fisher*, 1 B. & C. 459; 1 M. & R. 281, S. P.

cause it did not show in what manner the life of the duke would be endangered. (*u*) But where a count alleged that the defendant, intending to defame the Duke of Brunswick, published a libel containing divers false and malicious matters and things of and concerning the said duke, that is to say: We should think that no lady would admit to her society such a crack-brained scamp as the Duke of Brunswick (meaning the said duke), the Court of Exchequer Chamber held that these averments showed sufficiently, without more formal introduction, that the libel was of and concerning the duke. (*v*)

An information stated, that defendant, intending to excite hatred against the government of the realm, and to cause it to be believed that divers subjects had been inhumanly killed by certain troops of the King, published a libel of and concerning the government of this realm, and of and concerning the said troops, which libel stated, that the defendant saw with abhorrence, in the newspapers, the accounts of a transaction at Manchester, and alleged, that unarmed and unresisting men had been inhumanly cut down by the dragoons (meaning the said troops), and then commented strongly upon this being the use of a standing army, and called upon the people to demand justice, &c.; but it did not, in terms, say, that the dragoons acted under the authority or orders of the government. After conviction, a motion was made in arrest of judgment, on the ground that it did not sufficiently appear that the libel was written of and concerning the government, nor of or concerning what troops it was written: but the Court held, that it was obvious, from its whole tenor and import, that it meant to cast imputations upon the government; that it was a libel to impute crime to any of the King's troops, though it did not define what troops in particular were referred to; and that the innuendo of 'the said troops' meant the undefined part of those troops. (*w*) It is the duty of a judge to say whether a publication is *capable* of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it. (*x*)

Where written or printed matter in itself imports a libel on a person, no statement of extrinsic circumstances, by way of inducement, is necessary. It is no objection, therefore, in arrest of judgment that words are not explained by an innuendo where they are commonly enough understood in a libellous sense to warrant a jury in so applying them; (*y*) and if, in such a case, there be innuendos improperly enlarging the sense, they may be rejected as surplusage after verdict; (*z*) for on motion in arrest of judgment, or on error, an innuendo, which is not warranted by the words themselves, or properly connected with them by prefatory matter, may be rejected. (*a*) But the case would be different if the words were

(*u*) Gregory v. The Queen, 15 Q. B. 974.

(*v*) Gregory v. The Queen, 15 Q. B. 957.

(*w*) Rex v. Burdett, 4 B. & A. 314.

(*x*) Blagg v. Sturt, 10 Q. B. 899; Hunt v. Goodlake, 43 L. J. C. P. 54;

Mulligan v. Cole, 44 L. J. Q. B. 153.

(*y*) Hoare v. Silverlock, 12 Q. B. 624.

See Homer v. Taunton, 3 H. & N. 561.

where there was no innuendo to explain 'truckmaster,' and it was held that it was properly left to the jury to say whether it was used in a defamatory sense, though no evidence was given to explain its meaning.

(*z*) Harvey v. French, 2 Tyrw. 585, 1 C. & M. 11.

(*a*) Williams v. Stott, 3 Tyrw. 688; Iff & M. 675. Per Bayley, B.

capable of two senses, and the innuendo ascribed one meaning to them, and was good on the face of it. (*b*) If there be contained in the alleged libel matter which is *capable* of receiving the interpretation put upon it by an innuendo, there is no fault in the count for not having explanatory averments to fix and point the libel. But generally if the words written or spoken *cannot* apply to the individual, no previous averments or subsequent innuendos can help to give the words an application which they have not. 'Suppose the words to be, "a murder was committed in A.'s house last night," no introduction can warrant the innuendo "meaning that B. committed the said murder," nor would it be helped by the finding of the jury for the plaintiff. For the Court must see that the words do not and cannot mean it, and would arrest the judgment accordingly. (*c*) But if an innuendo ascribes to certain words a particular meaning, which cannot be supported in evidence, the innuendo, if well pleaded in form, cannot be repudiated on the trial, so as to let in proof that the words have another meaning. (*d*) If words be laid to be uttered with intent to convey a particular meaning to persons present, it must be proved that the party uttering them had that meaning, and that they were so understood by the hearers. (*e*)

### SEC. XIII.

#### *Evidence—Plea—Trial, &c.—Lord Campbell's Act.*

It may be laid down generally that all who are concerned in composing, writing, and publishing a libel, are guilty of the misdemeanor, unless the part they had in the transaction was a lawful or an innocent act. (*f*) Thus upon an information against the defendant, for printing and publishing a libel, the evidence was, that he acted as servant to the printer, and clapped down the press; and few or no circumstances were offered of his knowing the import of the paper, or being conscious that he was doing anything illegal; and Raymond, C. J., held that this made the defendant guilty, and so the jury found him. (*g*) But there must be a publication; and the mere writing or composing a defamatory paper by anyone, which is confined to his closet, and neither circulated nor read to others, will not render him responsible; nor will he be held to have published the paper, if he deliver it, by mistake, out of his study. (*h*) But this position admits of great doubt, and two very great judges seem to have been of opinion, that one who composes or writes a libel with intent to defame another, is guilty of a misdemeanor, although the libel be not published. (*i*) A

Of the making and publication of a libel.

(*b*) *Barrett v. Long*, 3 H. L. C. 395.

(*c*) *Solomon v. Lawson*, 8 Q. B. 823, per *curiam*.

(*d*) *Williams v. Stott*, *supra*.

(*e*) Per Bayley, B., *ibid.*, citing Woolnath v. Meadows, 5 East, 470. See as to the office and nature of an innuendo, 1 Stark. on Libel, 418, *et seq.* *Cloves v. Laffer*, 10 Bing. 250, 3 M. & S. 727.

*Day v. Robinson*, 1 Ad. & E. 554, 4 N. & M. 884. *West v. Smith*, 1 T. & G. 825. *Kelly v. Partington*, 5 B. & Ad. 645.

(*f*) Bac. Abr. tit. *Libel* (B.) 1.

(*g*) *Rex v. Clerk*, 1 Barnard, 304. *Sed qu.*, and *vide Day v. Bream*, *post*, p. 224.

(*h*) *Ray v. Pope*, 5 Mod. 165, 167.

(*i*) Lord Tenterden, C. J., and Hol-

count charging a defendant with having an obscene libel in his possession, with intent to publish it, seems to be bad. (*j*) And it will not be a publication of a libel if a party takes a copy of it, provided he never publishes it; (*k*) but a person who appears once to have written a libel, which is afterwards published, will be considered as the maker of it, unless he rebut the presumption of law by showing another to be the author, or prove the act to be innocent in himself. (*l*) For by Holt, C. J., if a libel appears under a man's handwriting, and no other author is known, he is taken in the mainour, (*m*) and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. (*n*) Where the manuscript of a libel was in the handwriting of the defendant, and a printer had printed five hundred copies from it, three hundred of which had been posted about Birmingham, but there was no evidence to connect the defendant with the printing or the posting, except the handwriting, it was held, that there was evidence to go to the jury that it was published by the defendant. (*o*) So the sale of an obscene print to a person in a private room, he having requested that such print should be shown to him, his object being to prosecute the seller, is a sufficient publication. (*p*) Where, in an action for libel contained in a pamphlet, a witness proved that the defendant gave her a pamphlet, and that she read parts of it, and that she had lent it to several persons, and it was returned to her, but she could not swear the copy produced was the same pamphlet the defendant gave her, but it was an exact copy, if it was not the same, and she believed it to be the

royd, J., in *Rex v. Burdett*, 4 B. & A. 95. Lord Tenterden said, 'The composition of a treasonable paper intended for publication, has, on more than one occasion, been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing on the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published.' Holroyd, J., said, 'Where a misdemeanor has been committed by writing and publishing a libel, the writing of such a libel so published is in my opinion criminal, and liable to be punished by the law of England as a misdemeanor, as well as the publishing of it.' And again, 'The composing and writing, with intent and for the purpose above stated, of a libel proved to have been published by the defendant, is in my opinion of itself a misdemeanor, in whatever county the publishing of it took place.' Upon the principle that an act done, and a criminal intention joined to that act, are sufficient to constitute a crime (vol. 1, p. 190), it should seem that writing a libel with intent to defame is a crime. C. S. G.

(*j*) *Rex v. Rosenstein*, 2 C. & P. 414, Park, J. J. A. This count seems clearly bad, on the ground that no act was charged; it is precisely similar to *Rex v. Stewart*, vol. 1, p. 190.

(*k*) Com. Dig. tit. *Libel* (B.) 2. Lamb's case, 9 Co. 596. But see *Rex v. Beare*, 2 Salk. 417. 1 Lord Raym. 414.

(*l*) Bac. Abr. tit. *Libel* (B.) 1. Lamb's case, 9 Co. 59. The writing a libel may be an innocent act in the clerk who draws the indictment, or in the student who takes notes of it. But in *Maloney v. Bartley*, 3 Campb. 210, Wood, B., held, on the trial of an action for a libel, in the shape of an *extra-judicial* affidavit sworn before a magistrate, that a person who acted as the magistrate's clerk was not bound to answer whether by the defendant's orders he wrote the affidavit, and delivered it to the magistrate, as he might thereby criminate himself.

(*m*) A man was taken with the mainour, mainouvre, when he was taken with the thing stolen in his possession, or, as it was termed in the ancient indictments, *captus cum manu opere*, and when so taken he might be brought into Court, arraigned, and tried without a grand jury. 2 Hale, 148. And some lords of manors had jurisdiction to try such cases; for I have the record of such an indictment for horse stealing, tried in the Court of Leek, Staffordshire, in the 35 Edw. 1. C. S. G.

(*n*) *Rex v. Beare*, 1 Lord Raym. 417. 2 Salk. 417.

(*o*) *Reg. v. Lovett*, 9 C. & P. 462, Littledale, J.

(*p*) *Reg. v. Carlisle*, 1 Cox, C. C. 229.

same, it was held that this was sufficient evidence to be left to the jury. (q)

The reading of a libel in the presence of another, without previous knowledge of its being a libel, or the laughing at a libel read by another, or the saying that such a libel is made by J. S., whether spoken with or without malice, does not amount to a publication. And it has also been held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is not punishable. (r) In an action for a libel contained in a caricature print, where the witness stated, that having heard that the defendant had a copy of this print, he went to his house and requested liberty to see it, and that the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed, Lord Ellenborough, C. J., ruled that this was not sufficient evidence of publication to support the action. (s)

Proof that the libel was contained in a letter directed to the party, and delivered into the party's hands, is sufficient proof of a publication upon an indictment or information. (t) Addressing a letter to a wife, containing matter reflecting on her husband, is a sufficient publication to support an action. (u) And delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication. (v) The production of a letter containing a libel with the seal broken, and the postmark on it, is *prima facie* evidence of publication. (w)

In an information for a libel against the doctrine of the Trinity, the witness for the Crown, who produced the libel, swore that it was shown to the defendant, who owned himself the author of that book, *errors of the press and some small variations excepted*. The counsel for the defendant objected that this evidence would not entitle the attorney-general to read the book, because the confession was not absolute, and therefore amounted to a denial that he was the author of that identical book. But Pratt, C. J., allowed it to be read, saying he would put it upon the defendant to show that there were material variances. (x)

Acknowledgment of the defendant.

(q) *Fryer v. Gathercole*, 4 Ex. R. 262.

(r) *Bac. Abr. tit. Libel (B.) 2*. This is doubted in 1 Hawkins, P. C. c. 73, s. 14, on the ground that jests of such a kind are not to be endured, and that the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it. As to reading a libel in the hearing of others, knowing it to be such, being a publication of it, see *Bac. Ab. Libel (B.) 2*.

(s) *Smith v. Wood*, 3 Campb. 323. And see *Rex v. Paine*, 5 Mod. 165, where a *qu.* is made in the margin, whether a person who has a libellous writing in his possession, and reads it to a private friend in his own house, is thereby guilty of publishing it.

(t) 1 Hawk. P. C. c. 73, s. 11. *Bac. Abr. tit. Libel (B.) 2, n. (a)*, *Selw. N. P.* 1050, *n. (9)*. *Reg. v. Brooke*, 7 Cox, C. C. 251. A further publication is necessary to support an action. *And it has been held that where the action was*

brought for a libel contained in a letter transmitted by the defendant to the plaintiff, by means of a third person, it is a question for the jury whether there has been any publication except to the plaintiff himself, and that if there has not, the defendant is entitled to their verdict. *Clutterbuck v. Chaffers*, 1 Stark. R. 471. But in an action for a libel contained in a letter written by the defendant to the plaintiff, it was held that proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk, was evidence to go to the jury of the defendant's intention that the letters should be read by a third person. *Delacroix v. Thevenot*, 2 Stark. R. 63.

(u) *Wenman v. Ash*, 13 C. B. 836.

(v) *Rex v. Burdett*, 4 B. & A. 95, *post*, p. 219.

(w) *Warren v. Warren*, 4 Tyrw. 850. 1 C. M. & R. 360. *Shipley v. Todhunter*,

(x) *Rex v. Hall*, 1 Str. 416.

Procuring  
another to  
publish is a  
publication.

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material whether he who disperses a libel knew anything of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. (2) Where a reporter to a newspaper proved that he had given a written statement to the editor of the paper, the contents of which had been communicated to him by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of some slight alterations, not affecting the sense; it was held, that what the reporter published, in consequence of what passed with the defendant, might be considered as published by the defendant; but that the newspaper could not be read without producing the written account delivered by the reporter to the editor. (a)

A libel written  
by the desire  
of and after-  
wards ap-  
proved of by  
the defendant.

The defendant was indicted for causing to be published in a newspaper a libel which told a story of the prosecutor, and added comments on the story, giving it a ludicrous character. The editor of the newspaper stated that the defendant had expressed a wish to him that he would 'show up' the prosecutor, and had told him the story. The witness communicated it to a reporter for the paper, and the libel was substantially what was so communicated. Before the publication the defendant remarked to the witness that the article had not yet appeared. After it had appeared, the defendant told the witness that he had seen it, and that he liked it very much. The witness had heard the story before the defendant told it him. The Court of Queen's Bench held, that on this evidence the jury might find that the defendant authorized the publication of this particular libel, notwithstanding the comments added, as there was both a general authority to publish, and an approval of the particular publication. (b)

In an action for libel the plaintiff complained of the publication in certain newspapers of reports of the proceedings of a board of guardians, containing defamatory statements concerning himself. At the meeting at which the proceedings in question took place, reporters were present in the discharge of their duty as representatives of newspapers. One of the defendants was chairman of the meeting, and the other was present and took part in the proceedings. The latter said that he hoped the local press would take notice of 'this scandalous case,' and requested the chairman to give an account of it. This he accordingly did, and in the course of his statement said, 'I am glad gentlemen of the press are in the room, and I hope they will take notice of it.' The other defendant thereupon said, 'And so do I.' The reports complained of were

(2) Bac. Abr. tit. *Libel* (B.) 2. 1 Hawk. P. C. c. 73, s. 10.

(a) *Adams v. Kelly*, R. & M. N. P. C. 157; *Parkes v. Prescott*, 38 L. J. Ex. 105.

(b) *Reg. v. Cooper*, 8 Q. B. 533. Lord Denman, C. J., said, 'If a man request another generally to write a libel, he must be answerable for any libel

written in pursuance of his request: he contributes to a misdemeanor, and is therefore responsible as a principal.' 'I have no doubt that a man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state.'



afterwards inserted in the newspapers, being somewhat condensed, but substantially correct, accounts of what had been said at the meeting. These reports were set out in the declaration, and constituted the libels complained of. The judge at the trial directed a verdict for the defendants, on the ground that there was no evidence of a publication by the defendants of these libels, to which direction the plaintiff excepted. Held (per Keating, J., Montague Smith, J., and Hannen, J., *dissentientibus* Byles, J., and Mellor, J.), that the direction was wrong, and that there was evidence for the jury. Per Byles, J., 'There is a distinction between the authority which will make a man liable criminally, and that which will make him liable civilly for the acts of another.' (c)

It was for a long time held, that the buying of a book or paper containing libellous matter, in a bookseller's shop, was sufficient evidence to charge the master with the publication, although it did not appear that he knew of any such book being there, or what the contents thereof were, and though he was not upon the premises, and had been kept away for a long time by illness; and it would not be presumed that it was bought and sold there by a stranger; but the master must, if he suggested anything of this kind in his excuse, prove it. (d) So the proprietor of a newspaper was answerable criminally as well as civilly for the acts of his servants in the publication of a libel, although it could be shown that such publication was without the privity of the proprietor; (e) for a person who derives profit from, and who furnishes means for, carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although it cannot be shown that he was individually concerned in the particular publication; (f) and these are acts done in the course of the trade or business carried on by the master. But there were cases in which the presumption arising from the proprietorship of a paper might be rebutted. (g) See when this presumption can now be rebutted, 6 & 7 Vict. c. 96, s. 7, noticed *post*, p. 227.

Publication by booksellers and proprietors of newspapers.

(c) *Parkes v. Prescott and Ellis*. 38 L. J. Ex. 105, *et per* Montague Smith, J., whilst delivering the judgment of the majority of the Court, 'In the result, I come to the conclusion that, on principle it is correct to hold that, where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher. If the law were otherwise, it would, in many cases, throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents. I make this observation only with reference to the general consequences which would result from the arguments relied on to sustain the defendant's contention.

(d) *Bac. Abr. tit. Libel* (B.) 2. *Rex v. Nutt*, Fitzgib. 47. 1 *Barnard. K. B.* 306. 2 Sess. Cas. 33, pl. 38. And see also *Rex v. Almon*, 5 Burr. 2686. And by Lord Hardwicke, in 2 Atk. 472. 'Though printing papers and pamphlets is a trade by which persons get their livelihood, yet they must take care to use it with prudence and caution; for if they print anything that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous.'

(e) *Rex v. Walter*, 3 Esp. N. P. C. 21; *Rex v. Dod*, 2 Sess. Cas. 33, pl. 38. In 1 Hawk. P. C. c. 73, s. 10 (7th edit.) Woodfall's case, Essay on Libels, p. 18. Salmon's case, B. R. Hil. 1777, and *Rex v. Almon*, 5 Burr. 2687.

(f) *Rex v. Gutch*, Moo. & M. 433, Lord Tenterden, C. J.

(g) *Rex v. Gutch*, Moo. & M. 433, Lord Tenterden, C. J., and see *Rex v. Almon*, 5 Burr. 2686.

In an action for a libel, where it appeared upon the evidence that the defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters; that a customer, to whom a bill written by the daughter had been sent by the daughter, sent it back on the ground of the charge being too high, and that the bill was afterwards returned to the customer inclosed in a letter also written by the defendant's daughter, and being a libel upon the plaintiff who had inspected and reduced the bill for the customer; it was holden that this was not sufficient evidence to go to a jury, either of command, authority, adoption, or recognition by the defendant. (*h*)

Proceedings  
against  
printers of  
newspapers.

The proceedings against the printers, publishers, and proprietors of newspapers for any libel contained in such papers were much facilitated by the 38 Geo. 3, c. 78, which was repealed by the 6 & 7 Will. 4, c. 76. This statute also contained enactments facilitating such proceedings. But these enactments, except sec. 19, are repealed by 32 & 33 Vict. c. 24. Sec. 19 enacts that, 'If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made.'

Persons print-  
ing papers for  
profit.

By 39 Geo. 3, c. 79 (an Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices), s. 29, 'Every person who shall print any paper for hire, reward, gain, or profit shall carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she shall write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she shall be employed to print the same; and every person printing any paper for hire, reward, gain, or profit, who shall omit or neglect to write, or cause to be written or printed as aforesaid, the name and place of his or her employer on one of such printed papers, or to keep or preserve the same for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months shall require to see the same, shall for every such omission, neglect, or refusal, forfeit and lose the sum of twenty pounds.'

By sec. 31, nothing herein contained shall extend to the impression of any engraving, or to the printing by letterpress of the name, or the name and address, or business or profession, of any person, and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise.

(*h*) *Harding v. Greening*, 8 Taunt. 42. And it was also held in this case that the daughter could not be compelled to prove

by whose direction the letter was written. The answer would tend to fix herself with the crime of writing it.

Secs. 34, 35 & 36 relate to the recovery of the penalties. This Act, by 51 Geo. 3, c. 65, does not require the name and residence of printers to be put to bank notes, bills, &c., or to any paper printed by authority of any public board or public office. See 32 & 33 Vict. c. 24.

By 2 & 3 Vict. c. 12, s. 2, 'Every person who after the passing of this Act shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business; and every person who shall publish or disperse, or assist in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum not more than five pounds. Provided always, that nothing herein contained shall be construed to impose any penalty upon any person for printing any paper excepted out of the operation of the said Act of the 39 Geo. 3, c. 79, either in the said Act or by any Act made for the amendment thereof.

Printer's name to be printed on book intended to be published.

By sec. 3, in the case of books or papers printed at the University Press of Oxford, or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words: "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be.

By sec. 4, no actions, &c. for penalties are to be commenced except in the name of the Attorney or Solicitor-General in England or the Queen's Advocate in Scotland. See 32 & 33 Vict. c. 24.

Before the 38 Geo. 3, c. 78, it was holden, upon an indictment for a libel in a newspaper, that evidence that the paper had been sold at the office of the defendant, that the defendant, as proprietor of the paper, had given a bond to the stamp office pursuant to the 29 Geo. 3, c. 50, s. 10, for securing the duties on the advertisements, and that he had from time to time applied to the stamp office respecting the duties on the paper, was evidence to be left to the jury, to show that the defendant was the publisher. (*j*) And since the statute it has been held to be sufficient evidence of a publication at common law to put in the original affidavit of the proprietor stating where the paper was to be published, and to prove that a paper with a corresponding title, containing the libel, was purchased there. (*k*) This was held in a case where it had been previously ruled that in order to render the certified copy of the affidavit made by the proprietor of a newspaper evidence under the 38 Geo. 3, c. 78, it must either appear upon the *jurat* that the person before whom it was made had authority to take it, or this fact must appear *aliunde*. (*l*) So the delivery of a newspaper to the officer at the stamp office is a sufficient publication to sustain an indictment for a libel in the paper. (*m*) So proof that the defendant, as proprietor of the newspaper in which a libel

Proof of publication.

(*j*) *Rex v. Topham*, 4 T. R. 120. (*l*) *Rex v. White*, 3 Campb. 99.

(*k*) *Rex v. White*, 3 Campb. 100.

(*m*) *Rex v. Amphlit*, 4 B. & C. 35.

is contained, accounted with the distributor of stamps for the duty on advertisements in the paper, is sufficient evidence of a publication by the defendant. (*n*) An affidavit according to the repealed statute 38 Geo. 3, c. 78, together with the production of a newspaper, corresponding in every respect with the description of it in the affidavit, was not only evidence of the publication of such paper by the parties named, but was also evidence of its publication in the county where the printing of it was described to be. (*o*) Where in an action for libel in a newspaper a certified copy of the stamp office declaration was put in, which stated the title of the paper to be 'The Leicester Herald and Midland Counties Advertiser,' and the intended place of publication to be 'No. 23, Charles Street, in the parish of St. Margaret, in the borough of Leicester,' and the paper containing the libel had the same title, but the place of publication was 'at the corner of Charles Street and Hadfield Street, in the parish of St. Margaret, in the borough of Leicester;' Lord Denman, C. J., held that the evidence of identity was sufficient (*p*) to enable the plaintiff to put the newspaper in evidence under the 8th section of 6 & 7 Will. 4, c. 76 (now repealed). But if the affidavit from the stamp office and the paper varied in the place where the paper was stated to be printed, as where the affidavit stated it to be 'in Union Street, Castle Street,' and the paper 'in Union Buildings, John Street,' the production of the affidavit and paper was not sufficient. (*q*) So where the affidavit described the proprietor's residence to be in 'Red Lion Street, St. Ann's Square,' and on the paper it was described as in 'St. Ann's Square;' Lord Tenterden held that as the party was not excluded from other proof of publication, if he relied on the statutory proof, he must bring himself within the statute, and that the discrepancy was fatal. (*r*) In moving for a criminal information a prosecutor was not bound to adopt the statutory proof, but if he adopted any other the publication must have been shown by some direct proof. (*s*)

Mortgagee of  
a newspaper.

Where in an action for libel to prove that the defendant, Harmer, was the proprietor of the 'Sun' newspaper, a certified copy of the declaration made at the stamp office under the repealed enactment 6 & 7 Will. 4, c. 76, s. 6, was put in, and it was a joint declaration, and stated that, 'We are the sole proprietors; that is to say, the said James Harmer, as legal owner as mortgagee, and Murdo Young, as owner of the equity of redemption;' it was objected that this declaration showed that the defendant was a mortgagee only, and not a proprietor against whom an action for libel could be maintained; but Lord Campbell, C. J., held that the defendant was liable. (*t*)

The libel must

Upon the trial the libel must in general be produced on the

(*n*) *Cook v. Ward*, 6 Bing. 409, 4 M. & P. 99.

(*o*) *Rex v. Hart*, 10 East, 94. *Mayne v. Fletcher*, 9 B. & C. 382, 4 M. & R. 311; *Reg. v. O'Connell*, 1 Cox, C. C. 405; *Rex v. Donnison*, 4 B. & Ad. 698. *Per Littledale, J.*, *Reg. v. Woolmer*, 12 A. & E. 422.

(*p*) *Baker v. Wilkinson*, C. & M. 399.

(*q*) *Rex v. Franceys*, 2 Ad. & E. 49.

(*r*) *Murray v. Souter*, cited 6 Bing. 414, in *Cook v. Ward*.

(*s*) *Reg. v. Baldwin*, 8 A. & E. 168, and see *Watts v. Fraser*, 7 A. & E. 223; *R. v. Stanger*, 40 L. J. Q. B. 96; *Rex v. Pearce, Peake's N. P. C. 75*.

(*t*) *Duke of Brunswick v. Harmer*, 2 C. & K. 10.

part of the prosecution, and, after sufficient proof of a publication by the defendant, may be read; and if the libel has merely been exhibited by the defendant, and he refuses on the trial to produce it, after notice for that purpose, parol evidence may be given of its contents. (*u*) The libellous matter must be set out in the indictment; (*v*) and the libel proved must appear to correspond with the statement of it in the indictment, and any variation in the sense between the matter charged and that proved will be fatal. (*w*) But the mere alteration of a single letter, so long as it does not change one word into another, will not vitiate; though the smallest variance, if it renders the meaning different, will be fatal. (*x*) As to amendments of variances at the trial, see vol. I, p. 52.

The libel must also be proved to have been published, by the party accused, in the county laid in the indictment. (*y*) But if a man write a libel in one county and consent to its publication in another, the consent is sufficient to charge him in the latter county. (*z*) So if a man write a libel in London, and send it by post addressed to a person in Exeter, he is guilty of a publication in Exeter. (*a*) And where the defendant wrote a libel in Leicestershire, with intent to publish it in Middlesex, and published it in Middlesex accordingly, and the information against him was in Leicestershire; three of the judges held the information right: but Bailey, J., doubted. (*b*) From the same case it appears to have been considered that delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication in the county in which it is so delivered: and further, that if delivering it open were essential, proof that the defendant wrote it in county A., and that C. delivered it unsealed to D. in county B., would be *prima facie* evidence that the defendant delivered it open to C. in the county A., though there be no evidence of C.'s having been in county A. about the time; or that application had been made to D. to know of whom he received it. The information was in the county of Leicester, for writing and publishing a libel: and it was proved by the date of the letter that the defendant wrote it in that county, and that Bickersteth delivered it to Brooks for publication in the county of Middlesex, it being then unsealed. Bickersteth was not called as a witness; and there was no evidence of his having been in the county of Leicester, or how the libel came to him. The jury were told that as Bickersteth had it open, they might presume that he received it open; and that, as the defendant wrote it in the county of Leicester, it might be presumed that Bickersteth received it in that county; and three judges held against the opinion of Bayley, J., that this direction was proper; and they also held that if the de-

be produced, and must correspond with the indictment;

And must be proved to have been published in the county.

(*u*) By Buller, J., in *Rex v. Watson* and others, 2 T. R. 201.

(*v*) *Rex v. Sacheverell*, 15 Sta. Tri. 466.

(*w*) *Tabart v. Tipper*, 1 Campb. 352. And if it appears upon the proof that parts of the libel which are separated by intervening matter are set forth as if they were continuous, it will be bad, if the sense is altered by the passage omitted. *Id. ibid.* It is settled that the whole libel need not be set forth in the indictment;

but if any part qualifies the rest, it may be given in evidence, 2 Salk. 417. See the 9 Geo. 4, c. 15, and 14 & 15 Vict. c. 100, s. 1, as to amendments of variances, vol. 1, p. 52.

(*x*) *Rex v. Beech*, 1 Leach, 133; *Rex v. Hart*, 1 Leach, 145.

(*y*) *Case of the Seven Bishops*, 12 St. Tri. 354.

(*z*) 12 St. Tr. 331.

(*a*) *Id. ibid.* 332.

(*b*) *W. v. Spence*, 4 B. & A. 95.

Post-marks.

livering open could not be presumed, a delivery sealed with a view to and for the purpose of publication was a publication ; and they thought there was sufficient ground for presuming some delivery, either open or sealed, in the county of Leicester. (c) It appears from this case that the dating a libel at a particular place is evidence of its having been written at that place. (d) The post-mark upon a letter has been considered as no evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such post-mark. (e) But it appears to be the better opinion that such post-marks, whether in town or country, proved to be such, are evidence that the letters on which they exist were in the offices to which the post-marks belong at the dates thereby specified. (f) But a mark of double postage having been paid on such letter is not of itself sufficient evidence that the letter contained an enclosure. (g) If a libellous letter is sent by the post, addressed to a party at a place out of the county in which the venue is laid in an indictment for the libel, yet, if it were first received by him within that county, it is a sufficient publication to support the indictment. (h) Owning the signature to a libel is no evidence in what county it was signed. This was held in the celebrated case of the Seven Bishops ; but additional evidence being afterwards given that the bishops applied to the Lord President of the Council about delivering a petition to the King, and that they were admitted to the King for that purpose in Middlesex, the case was left to the jury. (i) It has been held to be sufficient to prove a defendant to have *published* a libel without proving him to have *composed* it, upon a count in an information charging him with having 'composed, printed, and published' it. (j) So if the defendant is charged by a count in an indictment with having 'composed, *printed*, and published' a libel, if the evidence be that he only composed and published it, he may be found guilty of the composing and publishing, and acquitted of the printing. (k)

If the libel be in a *foreign language*, as it is necessary that it should be set forth in the indictment in the original language, and also in an English translation, it will be necessary to prove the translation to be correct. (l)

(c) Ibid., and MS. Bayley, J.

(d) Rex v. Burdett, 4 B. & A. 95.

(e) Rex v. Watson, 1 Campb. 215. Lord Ellenborough, C. J., said the post-mark might have been forged.

(f) Rex v. Plumer, Hil. T. 1814. MS. Bayley, J., and R. & R. 264. Rex v. Johnson, 7 East, 65. 2 Stark. Evid. 456, and Fletcher v. Braddyll, note (g), *ibid*.

(g) Rex v. Plumer, *supra*, note (f). Some person who paid or received the postage should be called.

(h) Rex v. Watson, 1 Campb. 215 ; and see Rex v. Middleton, 1 Str. 77. In the case of Rex v. Johnson, 7 East, 65, the publisher of a public register received an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom letters should be directed, to which an answer was returned in the register, after which he received two letters in the same hand-

writing directed as mentioned, and having the Irish post-mark on the envelopes, which two letters were proved to be in the handwriting of the defendant, the previous letter having been destroyed, it was held that this was a sufficient ground for the Court to have the letters read ; and the letters themselves containing expressions of the writer, indicative of his having sent them to the publisher of the register in Middlesex for the purpose of publication, the whole was evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex.

(i) Case of the Seven Bishops, 12 St. Tri. 183.

(j) Rex v. Hunt, 2 Campb. 583.

(k) Rex v. Williams, 2 Campb. 646, Lawrence, J., Rex v. Knell, 1 Barnard. 305.

(l) Rex v. Peltier, Selw. N. P. 1048.

Where an information for libel stated that the prosecutor had received certain anonymous letters, and that the defendant published a libellous placard of and concerning those letters, and the placard asked, 'Were you not warned that your character was at stake?' and the prosecutor stated that he should not have understood the meaning of the placard if he had not also seen the letters, and that he understood the passage in the placard to allude to the letters, it was held that the letters were admissible without proving who wrote or sent them, as the placard referred to them, and would not be intelligible without them, and that a defendant, who refers to other papers in his publication, must submit to have them read as explanatory of such publication. (*m*)

*Depositions* taken before a magistrate were not evidence upon a trial for a libel, under the 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10, (*n*) which extended only to cases of felony. (*o*) But as the 11 & 12 Vict. c. 42, extends to misdemeanors, it should seem that such depositions would now be evidence. (*oo*) A *Gazette* is evidence to prove an averment in an information for a libel, 'that divers addresses, &c., had been presented to his Majesty by divers of his loving subjects.' (*p*) *The King's proclamation*, reciting that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, had been held admissible evidence to prove an introductory averment, in an information for a libel, that divers acts of outrage had been committed in those parts. (*q*) And a *preamble* to an Act of Parliament, reciting the existence of such outrages, and making provision against them, was also held to be admissible for the same purpose. (*r*)

Depositions, a Gazette, the King's proclamation, and a preamble to an Act of Parliament, are evidence for certain purposes.

The criminal intention of the defendant will be matter of inference from the nature of the publication. Where a libellous publication appears, unexplained by any evidence, the jury should judge from the overt act; and, where the publication contains a charge slanderous in its nature, should from thence infer that the intention was malicious. (*s*) It is a general rule that an act unlawful in itself, and injurious to another, is considered both in law and reason to be done *malo animo* towards the person injured; and this is all that is meant by a charge of malice in a declaration for libel, which is introduced rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose. (*t*) The intention may be collected from the libel, unless the mode of publication, or other circumstances, explain it: and the publisher must be presumed to intend what the publication is likely to produce; so that if it is likely to excite sedition, he must be presumed to have intended that it should have that effect. (*u*) Publishing what is a libel without excuse is indictable, though the publisher be free from what in

Criminal intention of the defendant.

(*m*) *Rex v. Slaney*, 5 C. & P. 213, Lord Tenterden, C. J.

(*n*) Repealed by 7 Geo. 4, c. 64, s. 33.

(*o*) *Rex v. Paine*, 5 Mod. 163.

(*oo*) See *post*, *Evidence*.

(*p*) *Rex v. Holt*, 5 T. R. 436.

(*q*) *Rex v. Sutton*, 4 M. & S. 532.

(*r*) *Id. ibid.*

(*s*) By Lord Kenyon, C. J., in *Rex v.*

Lord Abingdon, 1 Esp. 228. And see *Rex v. Topham*, 4 T. R. 127, and *Rex v. Woodfall*, 5 Burr. 2667. *Stuart v. Lovell*, 2 Stark. R. 93.

(*t*) Per Lord Tenterden, C. J., *Duncan v. Thwaites*, 3 B. & C. 584, 585.

(*u*) *Rex v. Burdett*, 4 B. & A. 95.

*Reg. v. Lovett*, 8 C. & P. 462, Little-  
dale, J.

common parlance is called malice; for defaming wilfully without excuse is in law malicious. And even if it could be an excuse, that the publisher held what he published to be true, it is not so if he professes to publish it from authority. A newspaper contained this paragraph: 'the malady under which his Majesty labours is of an alarming nature (meaning insanity); it is from authority we speak.' At the trial of the indictment for this publication, the jury asked if a malicious intention were necessary to constitute a libel; to which Abbott, C. J., answered, that a man must have intended to do what his act was calculated to effect; and the jury found the defendant guilty. Upon a motion for a new trial it was admitted that the paragraph was libellous, but it was urged that malice was essential to make the defendant criminal; that he believed the King to have been so afflicted, and that the answer to the question by the jury was incorrect. But the Court thought otherwise, as the defendant must know if he spoke from authority, and could have proved it: and if malice were a question of fact, a man must be presumed to have intended to produce the effect which his act will naturally produce; and libelling without excuse is legal malice. (v) A person who publishes matter injurious to the character of another must be considered, in point of law, to have intended the consequences resulting from that act, (w) for every man must be presumed to intend the natural and ordinary consequences of his own act. (x) The judge, therefore, ought not to leave it as a question to the jury, whether the defendant intended to injure the person libelled, but whether the tendency of the publication was injurious to such person. (y) In some cases, however, the paper or other matter may be libellous only with reference to circumstances which should be laid before the jury by evidence.

Other libels to  
prove actual  
malice.

In order to show the existence of actual malice in the mind of the writer of a libel, other libels by him, whether written previously or subsequently, are admissible in evidence. (z) Where the House of Lords asked the judges 'in an action for libel, when the plea of the general issue is pleaded, and also a plea under the 6 & 7 Vict. c. 96, s. 1, denying actual malice, and stating the publication of an apology set forth in the plea, is it admissible upon a trial for the plaintiff to give evidence of other publications by the defendant (some of them more than six years before the publication complained of) of and concerning the plaintiff, in order to prove malice against the defendant?' the judges answered, 'We are all of opinion that, under such a plea, the publication of the previous libels on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels

(v) *Rex v. Harvey*, 2 B. & C. 257.

(w) *Per Lord Tenterden*, C. J. *Fisher v. Clement*, 10 B. & C. 472.

(x) *Per Lord Tenterden*, C. J. *Haire v. Wilson*, 9 B. & C. 643, 4 M. & R. 605.

(y) *Haire v. Wilson*, *supra*.

(z) *Pearson v. Lemaitre*, 5 M. & G. 700. *Darby v. Ouseley*, 1 H. & N. 1; *Stuart v. Lovel*, 2 Stark. Rep. 93.



are more or less frequent, or more or less remote from the time of the publication of that in question, merely affects the weight, not the admissibility of the evidence.' And the House of Lords held accordingly. (a)

Where an information for libel alleged that a person unknown murdered E. Grimwood, and that one Hubbard had been arrested on the charge of committing the murder and discharged, and the libel set out spoke of 'the acquittal of Hubbard for the murder of E. Grimwood;' it was held that the inducement was proved by evidence that a person had been murdered, and that Hubbard had been charged with the murder and afterwards discharged, and that at the inquest held on the body witnesses called the deceased by the name of E. Grimwood, and that this last fact might be proved by the coroner, and that he might for this purpose use an inquisition drawn up on paper. (b)

Evidence of a murder, &c.

Where a declaration for libel set out the following passage: 'We would suggest to the ex-Duke of Brunswick the propriety of withdrawing into his own *natural* and sinister obscurity' (meaning thereby to insinuate that the plaintiff was guilty of unnatural practices), Lord Campbell, C. J., refused to permit a witness to be asked if he had read the libel, and what he understood by the word '*natural*' printed in italics, as it was for the jury to form their own opinion as to what was meant by the word so printed. (c)

The meaning of a word in italics is for the jury.

In an action for libel it appeared that the plaintiff, an attorney, was employed by one Nash to bring an action against an executor; and that the defendant, who was employed to adjust the executor's accounts, finding that an action was about to be commenced against the executor, wrote a letter to Nash blaming him for allowing the plaintiff to sue, and containing this passage, 'If you will be misled by an attorney, who only considers his own interest, you will have to repent it; you may think when you have once ordered your attorney to write to Mr. G., he would not do any more without your further orders; but if you once set him about it, he will go any length without further orders.' And it was held that the question whether this letter applied to the plaintiff individually, or to the profession at large, was properly left to the jury. (d)

To whom a letter applies.

The evidence for the defence will now depend upon the defendant's pleas; if he plead that the libellous matter is true, and that it was published for the public benefit, it will lie upon him to prove these facts; but if he plead not guilty only, then the evidence which can be adduced on his behalf at the trial will in general be confined to a very narrow compass. There may, however, be cases of a publication in point of law, where no criminal intention can be imputed to the party; as where a person delivers a letter without knowing its contents, or delivers one paper instead of another; (e) and evidence to such effect may be produced. Where, therefore, an action was brought against the porter of a coach for a libel contained in a hand-bill, which he had de-

Defendant's evidence.

(a) *Barrett v. Long*, 3 H. L. C. 395. 3 C. & K. 10.

See *Hemmings v. Gasson*, E. B. & E. 346.

(d) *Godson v. Home*, 3 Moore, 223.

(e) By Lord Kenyon, C. J., in *Rex v.*

(b) *Reg. v. Gregory*, 8 Q. B. 508.

*Topham*, 4 T. B. 127, 128. *Rex v.*

(c) *Duke of Brunswick v. Hansler*,

*Nutt*, Fitz. 17.

livered tied up in a paper parcel, evidence was admitted that he delivered the parcel in the course of his business without any knowledge of its contents. (*f*) But it is not competent to the defendant to prove that a paper similar to that, for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it. (*g*) It was held, in a case where the supposed libel was contained in a newspaper, that the defendant had a right to have read in evidence any extract from the same paper, connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter, and printed in a different character. (*h*) Though the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury, yet if he conducts his defence himself, and any point of law arises which he professes himself unable to argue, the Court will hear this argued by his counsel. (*i*)

Proof of the truth of a triable offence is inadmissible.

If a libel imputes to a man a triable offence, proof of the truth of such imputation is inadmissible under a plea of not guilty. Where a libel imputed murder to certain soldiers, evidence was offered of the truth of such imputation, and rejected: and the Court of King's Bench were unanimous that such evidence was rightly rejected. (*j*)

Where an information for a libel states that certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and general evidence is given in proof of such transactions on the part of the prosecution, the defendant cannot, therefore, give evidence of the particular nature of those transactions so as to bring into issue the truth or falsehood of the libel. But if such evidence were adduced, *bonâ fide*, to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, it is admissible. (*k*)

Verdict.  
The jury may give a general verdict upon the whole matter put in issue.

It had been held in many cases, that, on trials for libels, the facts of writing, printing, or publishing, and the truth of the innuendos inserted in the proceedings, were the only matters to be submitted to the consideration of the jury: but the justice of such doctrine being questioned and ably arraigned, (*l*) the 32 Geo. 3, c. 60 (Fox's Act), was passed, sec. 1 of which enacts 'that on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty, upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by

(*f*) *Day v. Bream*, 2 M. & Rob. 54. Pattenon, J., who said '*primâ facie* he was answerable, he had in fact delivered and put into publication the libel complained of, and was therefore called upon to show his ignorance of the contents.'

(*g*) *Rex v. Holt*, 5 T. R. 436.

(*h*) *Rex v. Lambert*, 2 Campb. 398.

(*i*) *Rex v. White*, 3 Campb. 98.

(*j*) *Rex v. Burdett*, 4 B. & A. 95. 'In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance, suppose a paper were to state that A. was on a given day tried at a given place, and convicted of perjury; if that be true it may be no libel, but if false, it is from

beginning to end calumnious, and may no doubt be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel. *Ibid.* per Bayley, J., p. 147. *Reg. v. Brigstock*, 6 C. & P. 184. See *post*, where the defendant may plead that the libellous matters are true.

(*k*) *Rex v. Grant*, 5 B. & Ad. 1081.

(*l*) See the celebrated speeches of Mr. Erskine, in the case of the Dean of St. Asaph, *Ridgway's Col.* pp. 234, 264, vol. 1.

the Court or judge before whom such indictment or information shall be tried, to find the defendants or defendant guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.' By sec. 2, 'the Court, or judge before whom such indictment or information shall be tried, shall according to their or his discretion, give their or his opinion and directions to the jury, on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.' (m)

In criminal cases the judge is to define the crime, and the jury are to find whether the party has committed that offence; this Act made it the same in cases of libel, the practice having been otherwise before. (n) It has been the course for a long time for a judge in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution or civil action. Whether the particular publication, the subject of inquiry, is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a question upon which a jury is to exercise their judgment, and pronounce their opinion as a question of fact. The judge, as a matter of advice to them in deciding that question, may give his own opinion as to the nature of the publication, but is not bound to do so. (o)

The judge not bound under this Act to state whether in his opinion the writing is a libel, but he may do so.

The judgment in cases of libel at common law is in the discretion of the Court, as in most other cases of misdemeanors; and usually consists of fine, imprisonment, and the finding sureties to keep the peace. (p) Judgment was given on each of four counts of an information that the defendant be imprisoned on the first count 'for the space of two months now next ensuing;' on the second count, 'for the further space of two months, to be computed from and after the end and expiration of his imprisonment' for the offence mentioned in the first count; on the third count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the second count; and on the fourth count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the third count. The third count was adjudged on error to be insufficient: but it was held, that the sentence on the fourth count was not thereby invalidated, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count. (q)

Judgment.

In the case of a blasphemous or seditious libel, the 60 Geo. 3, & 1 Geo. 4, c. 8, s. 4, made a second offence punishable by banish-

In cases of blasphemous or seditious

(m) Sec. 3 provides that the jury may find a special verdict, in their discretion, as in other criminal cases. And sec. 4, that defendants may move in arrest of judgment as before the passing of the Act.

(n) Per Parke, B. *Parmiter v. Coupland*, 6 M. & W. 105; *Jenner v. A'Beckett*, 41 L. J. Q. B. 14.

(o) *Parmiter v. Coupland*, *supra*, *Baylis v. Lawrence*, 11 A. & E. 920.

*v. Levy*, 9 C. B. (N. S.) 342; *Rex v. Burdett*, 4 B. & A. 95; *Fray v. Fray*, 34 L. J. C. P. 45.

(p) 1 Hawk. P. C. c. 73, s. 21. *Bac. Abr. tit. Libel (C.)* *Rex v. Middleton*, Fort. 201. *Reg. v. Dunn*, 12 Q. B. 1026. As to the punishment of leasing-making, sedition and blasphemy in Scotland, see 6 Geo. 4, c. 47.

(q) *Gregory v. Reg.* 15 Q. B. 974.

libel, a second offence was punishable by banishment, but is not so now.

Publishing or threatening to publish a libel, or proposing to abstain from publishing any thing with intent to extort money, punishable by imprisonment and hard labour.

ment from the King's dominions, or such punishment as might be inflicted in cases of high misdemeanor; but the 11 Geo. 4 & 1 Will. 4, c. 73, s. 1, repealed 'so much and such parts of that Act as relate to the sentence of banishment for the second offence;' consequently the common law punishment alone remains. (*r*)

Most important alterations were made in the law of libel by Lord Campbell's Act. By that Act, (s) 6 & 7 Vict. c. 96, s. 3, 'If any person shall publish or threaten to publish any libel upon any other person, or shall directly, or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing, of any matter (*t*) or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: pro-

(*r*) A certificate of every indictment and conviction of any offender convicted of having composed, &c., any blasphemous or seditious libel, is, by sec. 2 of the former Act, to be given by the officer having the custody of the records, upon the request of the prosecutor on his Majesty's behalf, to the justices of assize, &c., where such offender shall be indicted for any second offence, and is to be sufficient proof of the conviction of such offender. And in all cases in which any verdict or judgment by default shall be had against any person for publishing any blasphemous or seditious libel, the judge or court may make an order for the seizure and carrying away and detaining all copies of the libel in the possession of the party, or of any other person named in the order for his use. See secs. 1, 2, and also sec. 3, as to Scotland. Secs. 8 and 9 provide for the limitation of actions brought for anything done in the execution of the Act. By sec. 10 the punishment of persons convicted of libel in Scotland is not to be altered.

(s) Sec. 1, 'for the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty,' enacts, 'that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action), to give evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.'

Sec. 2. 'In an action for a libel contained in any public newspaper or other

periodical publication it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall upon filing such plea be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled 'An Act for the further Amendment of the Law and the better Advancement of Justice;' and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea.' By the 8 & 9 Vict. c. 75, s. 2, the defendant is to pay money into court when the plea is filed; and sec 15 & 16 Vict. c. 76, s. 70.

(*t*) See *R. v. Coghlan*, 4 F. & F. 316.

vided always, that nothing herein contained shall in any manner alter or affect any law now in force in respect of the sending or delivery of threatening letters or writings.'

Sec. 4. 'If any person shall maliciously publish any defamatory libel knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the Court shall award.'

False defamatory libel punishable by imprisonment and fine ;

Sec. 5. 'If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment or both, as the Court may award, such imprisonment not to exceed the term of one year.'

Malicious defamatory libel, by imprisonment or fine.

Sec. 6. 'On the trial (*u*) of any indictment or information for a defamatory libel, the defendant having pleaded such plea as herein-after mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: provided also that, in addition to such plea, it shall be competent to the defendant to plead a plea of not guilty: provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel.'

Proceedings upon the trial of an indictment or information for a defamatory libel.

Double plea.

Proviso as to plea of not guilty in civil and criminal proceedings.

Sec. 7. 'Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.'

Evidence to rebut *prima facie* case of publication by an agent.

Sec. 8. 'In the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to

In what cases on prosecution for private libel, defend-

ant or prosecutor is entitled to costs.

recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; (v) and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the Court before which the said indictment or information is tried.' (w)

Interpretation of Act.

Sec. 9. 'Wherever throughout this Act, in describing the plaintiff or the defendant, or the party affected or intended to be affected by the offence, words are used importing the singular number or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless when the nature of the provision or the context of the Act shall exclude such construction.'

Threatening to publish a libel, &c.

Where one count charged the defendants with offering to prevent the publishing, and another with threatening to publish certain matters of the prosecutor with intent to extort money, and the defendants appeared to have attempted to obtain money from the prosecutor by leading him to believe that an information for an offence relating to the post-horse duties would be laid against him, and that they would prevent it if he paid them a sum of money, it was held that the evidence did not support the counts. (x)

A justification cannot be pleaded to a seditious libel.

It has been held in Ireland that to an indictment for publishing in a newspaper 'a certain false, defamatory, malicious, and seditious libel' concerning her Majesty's Government and the Parliament of the United Kingdom, with intent to create disaffection and hatred to her Majesty's Government and the Parliament, a special plea of justification cannot be pleaded under the 6 & 7 Vict. c. 96, s. 6. (y)

Previous libels by others inadmissible.

Where to a criminal information for a libel the defendant pleaded a justification, alleging that the imputations contained in the libel were true, it was held that it was not competent to the defendant to prove that imputations identical with those in the libel had been previously published in a book. (z)

There can be no partial finding on a plea of justification.

Where a justification is pleaded under the 6 & 7 Vict. c. 96, s. 6, to an information for a defamatory libel, and the libel contains several distinct imputations, and the plea alleges the truth of all, and is traversed generally, if the evidence fail as to any one of them, the verdict will be entered generally against the defendant. Where, therefore, upon the trial of such an issue upon such a plea, evidence was offered in support of some only of the imputations, and the jury found that only one of the imputations upon which evidence was offered was proved, the verdict was entered for the Crown generally; as there can be no partial finding for a defendant on the ground that a justification is partially established. (a)

The Court is to consider all the facts proved for and

By the express enactment that, wherever there is a conviction after such a plea of justification 'the Court, in pronouncing sentence,' shall 'consider whether the guilt of the defendant is aggra-

(v) See *post*, p. 229.

(w) Such costs may be recovered by action, *Richardson v. Willis*, 8 L. R. Ex. 69; 42 L. J. Ex. 68.

(x) *Reg. v. Yates*, 6 Cox C. C. 441.

(y) *Reg. v. Duffy*, 2 Cox, C. C. 45.

(z) *Reg. v. Newman*, 1 E. & B. 268.

(a) *Reg. v. Newman*, 1 E. & B. 558.

vated or mitigated by the said plea, and by the evidence given to prove and disprove the same,' the Court is to consider the evidence on the one side and the other, and to form their own conclusion whether it aggravates or mitigates the guilt of the defendant, and they are to apportion the punishment accordingly. The evidence, as it appears on the notes of the judge who presided at the trial, comes in place of affidavits in aggravation and mitigation of punishment when sentence is to be pronounced, and by that the sentence is to be regulated, and not by any declaration of the jury as to the credit which they think ought to be given to the witnesses. (b)

against a plea, and apportion the punishment accordingly.

In such a case the defendant may, in mitigation of punishment, show by affidavit that after the publication, but before pleading, information was given to him which, if true, would have supported an allegation in the plea, evidence having been given at the trial to account for the non-production of proof, but no evidence in support of the allegation itself. (c)

Affidavits in mitigation of punishment.

A libel imported to be founded on certain newspaper reports, and upon the foundation of those reports charged certain troops with acts of murder: after conviction the defendant offered affidavits that the newspapers did contain those reports, and also other affidavits that the facts were true. The former affidavits were received, because they explained the situation in which the defendant stood at the time he wrote the libel, and showed the impression under which he wrote; but the latter were rejected, because the receiving them might deprive of a fair trial persons who might afterwards be tried for the murders; and if murders were committed, the proper course was to prosecute and bring to a fair trial, not to libel and create an unfair prejudice. (d)

Where an indictment for a libel on the governor of a parish workhouse was preferred by the direction and carried on at the expense of the select vestry of the parish, and the defendant having removed it into the King's Bench by certiorari was convicted, it was held that the party libelled was not the 'party grieved' within the 5 & 6 Will. & M. c. 11, s. 3, and, therefore, was not entitled to costs. (e)

Costs.

When a prosecutor or defendant is entitled to costs under 6 & 7 Vict. c. 96, s. 8, see *ante*, p. 227. On a criminal information for libel the defendant, if he obtain a verdict, is entitled to costs under the 6 & 7 Vict. c. 96, s. 8, though he has not pleaded a special plea under sec. 6; and the judge cannot deprive him of costs by a certificate, the provision in the 4 & 5 Will. & M. c. 18, s. 2, on this head being superseded by the later Act. (f) Upon the trial of a criminal information for a defamatory libel the defendant obtained a verdict, whereupon the Master on taxation allowed him the costs which he had incurred in showing cause unsuccessfully against the rule nisi for filing the information under the above section 8: held by Mellor, J., and Lush, J. (Blackburn, J., dub.), that the allowance was properly made. (g) The Court of Queen's Bench has no jurisdiction to

Costs under 6 and 7 Vict. c. 96.

(b) Reg. v. Newman, 1 E. & B. 558.

See Reg. v. Hawdon, 3 P. & D. 44.

(c) Ibid.

(f) Reg. v. Latimer, 15 Q. B. 1077;

(d) Rex v. Burdett, 4 B. & A. 314.

20 L. J. Q. B. 129.

(e) Rex v. Dewhurst, 5 B. & Ad. 405.

(g) R. v. Steel, 45 L. J. M. C. 391.

direct the clerk of assize to review his taxation of costs (under the 6 & 7 Vict. c. 96, s. 8) of an indictment for libel tried on the Crown side under a commission of oyer and terminer. But, perhaps, one of the commissioners under that commission might do so, before that commission was superseded. (*h*)

The offence of libel is not triable at Quarter Session, (5 & 6 Vict. c. 38, s. 1.)

(*h*) Reg. v. Newhouse, 1 Bail. C. R. 129 ; 22 L. J. Q. B. 127.



## CHAPTER THE FOURTH.

## OF THREATS AND THREATENING LETTERS.

IT is said, that the dispersing of *bills of menace* threatening destruction to the lives or properties of those to whom they were addressed, for the purpose of extorting money, is, at common law, a high misdemeanor, punishable by fine and imprisonment. (a) Threats directed against persons immediately under the protection of a court are offences punishable by fine and imprisonment, as if a man threaten his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in his custody, and properly executing his duty. (b) And a precedent is given of an indictment at common law against the attorney of a plaintiff in a cause for writing a letter to the attorney of the defendant, who had obtained a verdict on the evidence of his son, threatening to indict the son for perjury unless the defendant gave up the benefit of the verdict. (c)

Threats at  
common law.

But it was holden that threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling *Fryar's Balsam*, without a stamp (whch by the 42 Geo. 3, c. 56, is prohibited to be vended without a stamped label), for the purpose of obtaining money to stay the prosecution, was not such a threat as a firm and prudent man might not be expected to resist, and, therefore, was not in itself an indictable offence at common law, although it was alleged that the money was obtained, no reference being made to any statute which prohibits such attempt. A count alleged that the defendant, intending to abuse the laws for the protection of the revenue, sent the following letter :—

Rex v. South-  
erton.  
Threatening  
to charge a  
party with  
penalties for  
selling me-  
dicines with-  
out a stamp,  
holden not to  
be indictable.

‘SIRS,

‘I am applied to to prosecute an information against you for selling certain medicines without stamps. I have told the parties that all such informations must now be prosecuted by the public officer, and have advised them to let me write to you on the subject, and hear what you have to say. If I can be of any service to you in stopping them, you will write me accordingly, and I will get the best terms I can.’ Another count charged the defendant with corruptly attempting to extort 10*l.* by threatening that a prosecution should be commenced for having sold Fryar's Balsam without a stamp. After argument in arrest of judgment, Lord Ellenborough

But where  
the threat is  
calculated to  
overcome a  
firm and pru-  
dent man, it is  
indictable.

(a) 1 Hawk. P. C. c. 53, s. 1. Reference is made to 1 Hale, 567, but no reference.  
(b) 4 Blac. Com. 126.  
(c) 11 Mod. 149.

C. J., said, 'To obtain money under a threat of any kind, or to attempt to do it, is, no doubt, an immoral action; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. Now, the threat used by the defendant at its utmost extent was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is not such a threat as a firm and prudent man might not, and ought not, to have resisted. Then what authority is there for considering these as offences at common law? The principal case relied on is that of *Rex v. Woodward*, (d) which was where the defendants, having another man in their actual custody at the time, threatened to carry him to gaol, upon a charge of perjury; and obtained money from him under that threat, in order to permit his release. Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases, under the influence of such threats, may amount to robbery; but not so in cases of threats of other kinds. But this is a case of threatening, and not of deceit; and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case, attended with duress, or, according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. The present case is nothing like any of those; it is a mere threat to bring an action, which a man of ordinary firmness might have resisted.' (e).

It appears that, according to the principles laid down in this case, an indictment will lie, at common law, for extorting money by actual duress, or by such threats as common firmness is not capable of resisting. Therefore, where money is extorted from a party by the threat of accusing him of an unnatural crime, and from the circumstances of the case the offence does not amount to robbery, (f) there seems no reason to doubt but that it is indictable as a misdemeanor at common law. (g).

Demanding property with menaces, with intent to steal; accusing, or threatening to accuse of an infamous crime with an intent to extort property, and by such accusation or threat actually extorting; the sending or delivering of a threatening letter, or writing to any person, thereby threatening to kill or murder, or to burn or destroy, or thereby with menaces demanding property; accusing, or threatening to accuse, or sending or delivering a letter, &c., accusing or threatening to accuse of certain crimes with intent to extort money, &c., are offences of the degree of felony by the provisions of recent statutes.

By the Offences against the Person Act, 24 & 25 Vict. c. 100, s. 16, 'whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents

Offences by  
statutes.

Sending  
letters  
threatening to  
murder.

(d) 11 Mod. 137, more fully stated in 6 East, R. 133.

(f) See vol. 2, p. 98, *et seq.*

(g) See a precedent in 3 Chit. Crim. L.

(e) *Rex v. Southerton*, 6 East, R. 126. 841  
And see vol. 1, p. 206.

thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten years and not less than three (*h*) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.' (*i*)

By the Malicious Injuries Act, 24 & 25 Vict. c. 97, s. 50, 'who-soever shall send, deliver, or utter, or *directly or indirectly cause to be received, knowing the contents thereof*, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick, or stack of grain, hay, or straw, or other agricultural produce, or *any grain, hay, or straw or other agricultural produce in or under any building*, or any ship or vessel, or *to kill, maim, or wound any cattle*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten years and not less than three (*i*) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and

Sending letters threatening to burn or destroy houses, buildings, ships, &c.

(*h*) Not less than five years if the offence was committed after the 25th day of July, 1864; see vol. 1, p. 73.

(*i*) This clause is framed from the 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.

The words 'directly or indirectly cause to be received' are taken from the 9 Geo. 4, c. 55, s. 8 (1), and introduced here in order to prevent any difficulty which might arise as to a case falling within the words 'send, deliver, or utter.'

The words of the 10 & 11 Vict. c. 66, s. 1, were 'if any person shall knowingly send or deliver or utter to any other person,' and the words 'to any other person' were advisedly omitted, in order that every sending, delivering, uttering, or causing to be received may be included. If, therefore, a person were to send a letter or writing without any address by a person, with directions to drop it in the garden of a house in which several persons lived, or if a person were to drop such a letter or writing anywhere, these cases would be within this clause. In truth, the new clauses make the offence to consist in sending, delivering, uttering, or directly or indirectly causing to be received any letter or writing, which contains a threat to kill or murder any person whatsoever, or to burn or destroy any house, &c., whatsoever, or to accuse any other person whatsoever of any crime, and it is wholly immaterial whether it be sent, &c., to any person or not, or whether it be sent, &c., to the person threatened, or to any other person. The cases, therefore, of *Rex v. Paddle*, R. & R. 484; *Reg. v. Burridge*, 2 M. & Rob. 296; *Reg. v. Jones*, 2 C. & K. 398; 1 Den. C. C. R. 218; and *Reg. v. Grimwade*, 1 C. & K. 592; 1 Den.

C. C. R. 30, are not to be considered as authorities on these clauses so far as they decide that the letter must be sent, &c., to the party threatened.

In every indictment on this and the similar clauses in the other Acts, a count should be inserted alleging that the defendant uttered the writing without stating any person to whom it was uttered. Counts for uttering forged instruments never state the person to whom they were uttered, and they show that such a count on this clause would clearly be good. See *Elsworth's case*, 2 East, P. C. c. 19, s. 59, p. 989, vol. 2, p. 707.

The words of the 4 Geo. 4, c. 54, s. 3, were 'any letter or writing with or without any name or signature subscribed thereto, or with a fictitious name or signature;' but the words of the 10 & 11 Vict. c. 66, s. 1, were 'any letter or writing' only, and the latter words are used in this clause, and it is clear that they are large enough to include any writing whatsoever.

The word 'maliciously' was unnecessarily introduced in the committee of the whole House of Commons, and renders this clause inconsistent with sec. 46 of the Larceny Act, and sec. 50 of the Malicious Injuries Act.

The 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1, used the terms, 'knowingly send,' &c. This was a clear inaccuracy; for it would include every person who sent or delivered a letter, though he were ignorant of its contents; 'knowingly,' therefore, has been omitted, and 'knowing the contents thereof' substituted, which really expresses the intention of the clause. See *Girdwood's case*, 1 Leach, 142, *post*, p. 240.

As to hard labour, &c., see *post*, p. 236; vol. 1, pp. 80, 81. C. S. G.

with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.' (j)

Letter  
demanding  
money, &c.,  
with menaces.

By the Larceny Act, 24 & 25 Vict. c. 96, s. 44, 'whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, *knowing the contents thereof*, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, (k) any *property, chattel, money, valuable security, or other valuable thing*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three (l) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.' (m)

Demanding  
money, &c.,  
with menaces,  
or by force,  
with intent to  
steal.

Sec. 45. 'Whosoever shall with menaces or by force demand any *property, chattel, money, valuable security, or other valuable thing* of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three (l) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (n)

(j) This clause is taken from the 4 Geo. 4. c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.

See the preceding note as to the first two lines of this clause.

The clause is extended to letters threatening to burn any grain, hay, &c., in or under any building, or to kill, maim, or wound any cattle. In any indictment under this section a count should be inserted, alleging that the prisoners uttered the letter or writing without stating to whom the same was uttered. See the last note.

As to hard labour, &c., see *post*, p. 236; vol. 1, pp. 80, 81.

(k) *R. v. Chalmers*, 10 Cox, C. C. 450.

(l) Not less than five years if the offence was committed after the 25th of July, 1864; see vol. 1, p. 73.

(m) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 8, and 9 Geo. 4, c. 55, s. 8 (1.).

The beginning of this clause is made to correspond with the beginning of sec. 46, *infra*, of sec. 50 of the Malicious Injuries Act, *ante*, p. 233, and of sec. 16 of the Offences against the Person Act, *ante*, p. 232, as all these sections contain similar enactments. See the note, *ante*, p. 233, for the observations on the beginning of these clauses.

The alteration as to 'property, &c.,' is made in order that this clause and ss. 45, 46, and 47 may correspond.

As to hard labour, &c., see *post*, p. 236; vol. 1, pp. 80, 81.

(n) This clause is taken from the 7 Will. 4 & 1 Vict. c. 87, s. 7.

See the last note as to the words in italics.

As to hard labour, &c., see *post*, p. 236; vol. 1, pp. 80, 81.

The prisoner was indicted under the above 45th section, for feloniously demanding, with menaces, five shillings from the prosecutor. The prisoner was a policeman on duty in his uniform, and the prosecutor proved that he was going home in the night, and had spoken to a woman, when the prisoner came up and said, 'You have been talking to a prostitute.' I said, 'I do not know who she is or what she is.' He said, 'You must go with me to Hotham Street, Bridewell.' I said, 'I had the care of three horses, and if he would go with me to my master, and leave the keys, I would go anywhere with him.' He said I was under a penalty of 17. and costs for talking to a prostitute in the streets, and that if I would give him 5s. I might go about my business. He pulled out a book to take my name. He asked my name, and said he would write it down. He did not write it down. He took the book out before he mentioned the 5s. I pulled out a half-crown and two-shilling piece, and he placed it in his right-hand pocket. The prisoner afterwards said, 'This is only a two-shilling piece; I must have the other sixpence. It was objected, 1st, that as the money was obtained, the case was not within the clause of the statute; 2nd, that this was not a menace within the statute, as it was a threat to accuse of a non-existing offence; but, upon a case reserved, it was held, 1st, that the first objection was not correct, because part only of the 5s. demanded was obtained; and even if the whole had been obtained, *Reg. v. Norton*, 8 C. & P. 73, showed that that made no difference;

Sec. 46. 'Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, *knowing the contents thereof*, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death, or *penal servitude for not less than seven years*, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, *chattel*, money, valuable security or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three (o) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act.' (p)

Letter threatening to accuse of crime, with intent to extort.

'Infamous crime' defined.

Sec. 47. 'Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other (q) person, any property, *chattel*, money, valuable security, or other valuable thing,

Accusing or threatening to accuse with intent to extort.

2nd, that there was no ground for the objection that this was not a menace, because it was a threat to accuse of a non-existing offence. If a policeman states that he is acting under authority, and that it is his intention to exercise the authority which he professes to have unless money is given to him, that is a menace within the statute. The threat was within the plain words of the statute. *Reg. v. Robertson*, 10 Cox, C. C. 9. *Reg. v. Walton*, L. & C. 288, had been relied on for the prisoner, and the Court did not express any approval of the judgment in that case; and the decision in this case seems to bear against that judgment. *Rex v. Knewland* being cited, Channell, B., said, 'This is a statutory offence. The decision in that case was that the facts did not support an indictment for robbery at common law,' which is the correct distinction.

(o) Not less than five years if the offence was committed after the 25th July, 1864; see vol. 1, p. 73.

(p) This clause is taken from the 7 & 8 Geo. 4, c. 29, ss. 8, 9; 9 Geo. 4, c. 55, ss. 8, 9, (1); and 10 & 11 Vict. c. 66, s. 1.

The beginning of this clause is made

to correspond with the beginning of sec. 44, *ante*, p. 234, of sec. 50 of the Malicious Injuries Act, *ante*, p. 233, and of sec. 16 of the Offences against the Person Act, *ante*, p. 232, as all these sections contain similar enactments. See the note, *ante*, p. 233, for the observations on the beginning of these clauses.

As to hard labour, &c., see *post*, p. 236; vol. 1, pp. 80, 81.

(q) Prisoner went to a boy's father, and said that the boy had committed an abominable offence upon a mare belonging to him. The prisoner said that if the father would not buy the mare of him for 3*l.* 10*s.*, he would accuse the boy. The prisoner also said the same to the boy's master. Failing in his attempt so to dispose of the mare, he preferred the charge against the boy, which was dismissed; held that the prisoner was guilty of threatening to accuse of an infamous crime within this section. *R. v. Redman*, 10 Cox, C. C. 159, 35 L. J. M. C. 89. On the trial of an indictment for threatening to accuse of an infamous crime in order to extort money, the guilt or innocence of the party accused is immaterial. *R. v. Cracknell*, 10 Cox, C. C. 408; *R. v. Richardson*, 10 Cox, C. C. 43.

shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three (*qq*) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.’ (*r*)

As to inducing a person by threats to execute deeds, &c., with intent to defraud, see sec. 48, vol. ii. p. 81.

Immaterial from whom the menaces proceeded.

Sec. 49. ‘It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person. (*s*)’

Principals in the second degree and accessories.

As to the punishment of principals in the second degree, accessories, and aiders and abettors, see sec. 98, vol. i., p. 185.

Offences committed within the jurisdiction of the Admiralty.

As to offences committed within the jurisdiction of the Admiralty, see sec. 115, vol. i. p. 14.

Fines and sureties.

As to fining the offender, and requiring him to enter into his own recognizances, and to find sureties for keeping the peace, &c., see sec. 117, vol. i. p. 81.

Hard labour.

As to hard labour, &c., see sec. 118, vol. i. p. 80.

Solitary confinement.

As to solitary confinement, whipping, &c., see sec. 119, vol. i., p. 80.

None of these Acts extend to Scotland.

As to intimidating a person with a view to compel him to abstain from doing or to do any act which he has a legal right to do or abstain from doing, see the Conspiracy and Protection of Property Act, 1875, sec. 7, *ante*, p. 162.

Some of the cases decided upon the repealed Acts may assist in the construction of the present statutes.

### Cases on Repealed Statutes.

As to the demand within the repealed clause of the 9 Geo. 1, c. 22.

The construction of the 9 Geo. 1, c. 22, was much considered, in a case where the prisoner, Michael Robinson, was indicted for sending the following letter, dated, &c., without any name subscribed thereto, to one, J. O. Oldham, demanding of him a certain valuable thing, namely, a bank note, against the form of the statute :—

‘SIR,

‘I am well pleased to find that I am not likely to be mistaken in the idea I have entertained of you amongst men of a proper and liberal way of thinking: an understanding on such a matter as this is the easiest thing imaginable, and in repeating that you will find me a gentleman, I wish you to be satisfied that I am as incapable of taking any unmanly advantage as of wantonly sporting with the feelings of any one; I have ever despised and execrated the cowardly assassin, who, skulking in obscurity, sends forth his malignant shafts to wound the peace and the character of individuals; and I have, therefore, uniformly resisted every overture that has been made me for such a purpose. My situation as

(*qq*) Not less than five years if the offence was committed after the 25th of July, 1864; see vol. 1, p. 73.

(*r*) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 8; 9 Geo. 4, c. 55, s. 8 (1); 7 Will. 4 & 1 Vict. c. 87, s. 4; and 10 & 11 Vict. c. 66, s. 2.

As to hard labour, &c. see *infra*;

vol. 1, pp. 80, 81.

(*s*) This clause is new. It is intended to meet cases where a letter may be sent by one person and may contain menaces of injury by another, and to remove the doubts occasioned by *Rex v. Pickford*, 4 C. & P. 227, and see *Reg. v. Smith*, 1 Den. C. C. 510, *post*, p. 243.

a literary character has teemed with temptations, but a sacred principle of honour has superseded them all. The subject on which I have addressed you has long lain dormant, and it was because I thought the attack of a most serious complexion that I hesitated for such a length of time in giving any countenance to it; not that I ever sought for any circumstance to influence my judgment or qualify my opinion, and, for all that has ever come to my knowledge, it may be all *the moonshine of the moment*: I am, therefore, so far candid, and I trust, not indelicate; and it will at least be a satisfaction to you to be told, with a solemnity becoming the character I have professed myself, that not a soul but myself is in possession of a line of the MS., nor has it ever been out of my hands, or perused or heard by any person living since first I had it; so that when it is committed to the flames *all* will necessarily die with it. Of this you shall have a testimony so clear and unequivocal that it will not be possible for you afterwards to doubt. Thus much I have suggested for your satisfaction; you will now give me leave to say something on behalf of *the cause* I have engaged in. I have not the least objection to an interview, and I readily close with your proposition; but there are a few preliminaries which I must first beg leave to adjust. Perhaps I may be more anxious to urge them, in order to have some proof of your sincerity, after which I am at your service. In order to relieve a destitute and unhappy family, struggling with sickness and sorrow, you will permit me to be your almoner. Will you enable me to dispose of a little of your money, as I shall see occasion? It is a duty I owe to the cause of humanity to urge it. Remember, sir, I am now only making my appeal to your *benevolence*. I am holding out no delusions to exact the involuntary tribute. I am asking you as a gentleman, as a man, to give me some earnest of your intention to prove what I am so strongly inclined to give you credit for. Inclose a bank-note in a letter addressed to R. R., and let it be left at the Cambridge coffee-house, the top of Newman-street, in Goodge-street, on the side of the bar. At the entrance of the coffee-room is a bracket for letters; let it be placed there between the hours of eleven and one, on Thursday next; and at five o'clock on the same day a line shall be sent by a porter to your house to acknowledge the receipt; after which, if you will name any day (Friday excepted) in the following week on which it will suit you, in the evening, to take a bottle of wine at the King's-head tavern, in Middle-row, Holborn, or elsewhere, I will with pleasure attend you. Our meeting, however, is to be private and *tête-à-tête*. Thus, possibly, over the ashes of the MS. a phoenix may arise that may prove the forerunner to friendship. I shall send to the coffee-house between the hours of one and four, and I will venture to say that you will have no reason to be dissatisfied with the event of this correspondence. To obtain confidence it is necessary, or at least reasonable, to expect that one should be reposed.

‘I have the honour to remain, Sir,

‘Your obedient humble servant,

‘Tuesday, 12th January, 1796.

‘R. R.

‘J. O. OLDHAM, Esq.,

‘Brook-street,

‘(Private.) Holborn.’ *Digitized by Microsoft®*

The prosecutor had served an apprenticeship with a person named Dolly, by whom he was afterwards taken into partnership ; upon Dolly's death a report was spread that the prosecutor had been the author of his death, upon which he brought an action against two persons, and had judgment against them. Before the letter in question was sent, several other letters had been written by the prisoner to the prosecutor, to which he returned answers, for the purpose of obtaining information of the prisoner's place of abode, in order to bring him to justice. And all these letters were read in evidence, as serving to explain the letter upon which the prisoner was indicted. It was intimated in them that another person, who was a friend of the prisoner's, and who was in distress, had put certain MSS. into his hands, containing a charge of the prosecutor having murdered his former master, Dolly, and afterwards married the widow, his accomplice ; but that the prisoner was unwilling to publish the MSS. containing so serious a charge without giving a previous intimation to the prosecutor, and hearing what he had to propose upon the subject. A subsequent correspondence between the prosecutor and the prisoner was also given in evidence ; in the course of which the prisoner communicated a few pages of the supposed MSS. in verse, from which the charge alluded to was to be plainly inferred. Upon this evidence the learned judge before whom the prisoner was tried left the case to the jury to say whether the prisoner sent the letter above set forth, and whether it contained a threat to publish a libel on the prosecutor, imputing to him the death of Dolly, unless he would send the prisoner a bank note ; and in case they were of that opinion they were directed to find the prisoner guilty. The jury found him guilty, and also found specially that the prisoner sent the letter in the indictment, and that it contained a threat to publish a libel, imputing to the prosecutor the murder of his master, in order to extort money from him. Several objections were taken to this conviction, and amongst others it was objected that the letter did not contain *a threat or demand*, so as to bring the case within the 9 Geo. 1, c. 22. But the judges, after hearing the point argued, all agreed in overruling the objection. Buller, J., in delivering their opinion, after adverting to the preamble of the statute (upon which the counsel for the prisoner had founded his argument, by contending that it necessarily so far restrained the enacting clause that the demand contained in a letter must be subscribed and peremptorily accompanied with a threat of bodily harm), said :—'Where the enacting clause of a statute refers to such offences only as are contained in the preamble, it may be restrained by the preamble ; but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions of the statute, if it were so restrained. It is no uncommon thing for the preamble of a statute to recite a particular mischief, as the cause of making it, and yet for the enacting part to embrace more general objects, and to extend to other cases which the legislature thought within the mischief. If the enacting clause in this case were to be restrained by the preamble, the statute would apply only to cases where several persons had joined together in confederacy ; where the letter was signed with a fictitious name only, and where violence or money was demanded ;

Other letters received in evidence to explain the letter on which the indictment was founded.

Direction to the jury.

Objections.

Judgment.



and not to a letter without a name, nor to a demand of any other valuable thing than money or venison, nor to any demands by such letters, whether accompanied with a threat of bodily harm or not. But the enacting clause expressly applies to a single offender; to a letter sent without a name, as well as to one signed with a fictitious name; and to a demand of any valuable thing as well as of money or venison; and also to all demands by such letters, whether accompanied with a threat of bodily harm or not. I agree that a mere request, such as asking charity without imposing any conditions, would not come within the sense or meaning of the word "*demand*;" but here the demand was made under a threat that if it was not complied with the prisoner would publish a libel against the prosecutor, imputing to him the death of his master: for this is the construction which the jury by their verdict have expressly put upon the letter. Now, whether the letter does amount to such a demand or not is a question for the judges to determine, upon reading it, as it is stated in the record; and they are all clearly of opinion that this is a *demand* within the true intent and meaning of this statute. It is a demand of money or money's worth (which a bank note is), by holding out a threat to impute murder to the prosecutor, and to injure his fame and his character; and not a request of voluntary charity.' (t)

Demand.

In the following case, upon the 27 Geo. 2, c. 15, it was holden that the construction of the letter, namely, the question whether it contained, in the terms of it, an actual threatening to kill or murder, was properly left to the jury. The first count charged the prisoner generally with feloniously sending to the prosecutor a certain letter in writing, with the fictitious letters J. W. thereunto subscribed, threatening to kill and murder the prosecutor. (u) In the second count the letter was set out in the following form:—

Question left to the jury, whether a letter contained an actual threatening to kill or murder, within the repealed clause of 27 Geo. 2, c. 15.

'SIR,

'February 9, 1776.

'I am sorry to find a gentleman like you would be guilty of taking *MacAllester's* life away for the sake of two or three guineas; but it will not be forgot by one who is just come home to revenge his cause. This you may depend upon, whenever I meet you, I will lay my life for him in this cause. I follow the road, though I have been out of London; but on receiving a letter from *MacAllester* before he died, for to seek revenge, I am come to town. I remain a true friend to *MacAllester*.

'J. W.'

Hotham, B., left it to the jury to consider whether this letter contained in the terms of it an actual threatening to kill or murder, directing them to acquit the prisoner if they thought that the words might import anything less than to kill or murder. The jury found the prisoner guilty, and upon a case reserved on the point (amongst others), viz., whether the letter purported to be a letter threatening to kill or murder, ten judges, who were present, were all clearly of opinion that the conviction was right,

(t) Robinson's case, 2 Leach, 479. 2 sity of setting out the letter in the indictment.  
East, P. C. c. 23, s. 2, p. 1110.

(u) See *post*, p. 252, as to the

and that the construction of the letter was properly left to the jury. (*v*)

Jepson's case. Holden that as the letter did not by necessary construction import a threat to burn, &c., a conviction upon that statute was wrong.

It was holden, however, in a subsequent case, that as the letter in question did not, by *necessary construction*, import a threat to burn the prosecutor's farm-house and buildings, a conviction upon the 27 Geo. 2, c. 15, was wrong. The letter was as follows:—

‘ Mr. WOODGATE,—Sir,

‘ March 3rd, 1798.

‘ I am very sorry to acquaint you that we are determined to set your mill on fire, and likewise to do all the public injury that we are able to do you, in all your *farms and seteres*, (*w*) which you are in possession of, without you on next (*x*) day release that Ann Wood which you put in confinement. Sir, we mention in a few lines that we hope if you have any regard for your wife and family you will take our meaning without anything further; and if you do not we will persist as far as we possibly can, so you may lay your hand at your heart, and strive your uttermost ruin. I shall not mention nothing more to you until such time as you find the few lines a fact, with our respect. So no more at this time from me,

‘ R. R.’

Upon the trial, Mr. Woodgate, the prosecutor, swore that he had had a share in a mill three years before this letter was written, but had no mill at that time; but that he held a farm when the letter was written and came to his hands, and still held it, with several buildings upon it. It was objected that this was not such a letter as comprehended the offence in the Act of Parliament; and the prisoner having been convicted, the point was submitted to the consideration of the judges, who agreed (except Eyre, C. J., who was absent) that as the prosecutor had no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest of the letter, Lord Kenyon, C. J., and Buller, J., were of opinion that it must be understood as also importing a threat to burn the prosecutor's farm-house and buildings; but the other judges not thinking that a necessary construction, the conviction was holden wrong. (*y*)

It has since been held that upon the trial of an indictment for sending a letter to the prosecutor, threatening to burn his house, &c., it may be left to the jury to say whether the letter amounted to such a threat. The indictment charged that the prisoners feloniously did send to J. Belcher a writing, without name or signature, directed to the said J. Belcher, by the name and description of ‘Starve-gut Belcher,’ threatening to kill and murder him, which said writing is as follows, viz. :—‘Starve-gut Belcher, if you don't go on better great will be the consequence; what do you think you must alter an (or) must be set fire; this came from

On an indictment under the 4 Geo. 4, c. 54, s. 3, for sending a letter threatening to burn, &c., which is set out, it may be left to the jury to say whether the letter sent

(*v*) Girdwood's case, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120. The prisoner was executed.

(*w*) It is said that by this was understood ‘settings or lettings,’ and that the whole letter was evidently the production of an illiterate person, being falsely spelt

nearly throughout. 2 East, P. C. c. 23, s. 2, p. 1115, note (*α*).

(*x*) 1n 2 East, *ibid.*, the learned writer says, that the word at this part was unintelligible in his copy.

(*y*) Rex *v.* Jepson, 2 East, P. C. c. 23, s. 2, p. 1115.

London: i say your nose is as long rod gffg sharp as a flint, 1835. You ought to pay your men.' A second count set out the letter as threatening to burn and destroy his houses, outhouses, barns, stacks of corn and grain, hay and straw. Lord Denman, C. J., asked the jury in the terms of the statute, whether this was a letter threatening to put J. Belcher to death, or to burn and destroy his houses, outhouses, barns, stacks of corn and grain, hay and straw? The jury negatived the threat to put him to death, but found that the letter threatened to fire his houses, outhouses, barns, stacks of corn and grain, hay and straw. Lord Denman, C. J., had some doubts whether this question ought to have been left to the jury, and whether the letter could be in point of law a threatening letter, to the effect found; but, upon a case reserved, the judges held the conviction good after verdict. (z)

amounted to such threat.

A letter threatening to accuse the prosecutor of having made overtures to the prisoner to commit sodomy with him, did not threaten to charge such an infamous crime as to be within the 4 Geo. 4, c. 54, s. 3. (a)

Under the 4 Geo. 4, c. 54, s. 3, such crimes only were to be deemed infamous as subjected a man to infamous punishment or incapacitated him from being a witness.

A letter intimating that some persons had conspired to burn or otherwise destroy the property of the prosecutor, and offering to make a disclosure if a certain sum of money was placed in a certain spot for the writer, is not within the 7 & 8 Geo. 4, c. 29, s. 8; though it may create apprehension in the owner's mind, it does not contain a menace. (b) The prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 8, for sending the following letter to Mr. Young, demanding money with menaces:—

A letter stating that the writer had overheard persons agree to injure the property of the prosecutor, and if he would lay thirty sovereigns at a certain place the writer would give information to frustrate the attempt.

'SIR,

'As you are a gentleman and highly respected by all who know you, I think it my duty to inform you of a conspiracy. There is a few young men who have agreed among themselves to take from you personally a sum of money, or injure your property. I have overheard all the affair. I mean to say, your building property, in the manner they have planned this dreadful undertaking, would be a most serious loss. They have agreed to commence this upon an appointed time in the course of this winter, which would be a most dreadful sight. Sir, I could give you every particular information how you may preserve your property and your person, and how to detect and secure the offenders. Sir, if you will lay me a purse of thirty sovereigns upon the garden edge, close to Mr. Tatler's garden gate, I will leave a letter in the place, to inform you of the night this is to take place. I can also inform you how you could be sure to secure the offenders; but you must keep this all quite secret, and not make a talk of it, as it would come to their ears, and then they would put it off to another time. Sir, I hope you will not attempt to seize upon me, when I come to take up the money and lay down the note of information. Sir, you will find I am doing you a most serious favour. You will

(z) *Rex v. Tyler*, R. & M. C. C. R. 428.

(a) *Rex v. Hickman*, R. & M. C. C. R. 34. The word 'solicitation' was introduced in the 6 Geo. 4, c. 19, the 7 & 8 Geo. 4, c. 29, s. 9, and the 1 Vict. c. 57, s. 4, to meet this case. Another point,

on which the judges were equally divided, was whether the letter supported a count for sending a letter demanding money from the prosecutor.

(b) *MS. Bayley, J.* 3 Burn, J. D. &

please excuse me in not describing my name, but I will make myself known the day after you have taken them, and be a witness against them. I shall come to lay down my letter on the 1st of December if I find the money. Sir, I am your unknown friend.'

It appeared that the prisoner had written the letter, and had done so with an intention of getting the thirty sovereigns to leave the country. For the prosecution it was contended that the letter contained a sufficient demand of money, as the request was accompanied by a condition, namely, to discover persons going to do a certain act; and *Robinson's case* (c) was cited. And, with respect to the menaces, to hold that the letter contained none, would be equivalent to holding that, whenever the menaces came from one person, and the letter from another, neither could be indicted; and, at all events, it was a question for the jury whether the letter did contain menaces. *Girdwood's case*. (d) Bolland, B., thought that he ought to decide whether the letter contained menaces or not; but he consulted Littledale, J., who thought the question should be left to the jury; and Bolland, B., then left it to the jury to say, whether the letter contained menaces: and they convicted the prisoner; but, upon a case reserved, the judges were of opinion that the conviction was wrong. (e)

The prisoner was convicted of having feloniously sent a letter to Sir W. R. Farquhar, Baronet, and others, demanding money with menaces, and without any reasonable or probable cause, of which letter the following is a copy:—

'GENTLEMEN,

'You say B. O. N. will accede to the terms proposed, and send part of the means to any place which may be named. You would have had an answer yesterday, but was prevented. If you act honourably by me, and not by any means deceive me, or allow any spy to watch me *I will save you or perish in the attempt, though I hazard my life in so doing*, and must have sufficient means at my disposal without delay, or all will be lost. I am fully assured that 20,000*l.* would not cover the horrid catastrophe, which would not only stop your bank for a time, but perhaps for ever, as the books would be all destroyed. The match, the most dreadful and last resource, has been contemplated by the cracksmen or captain of this most horrid gang, which I fervently pray to be relieved from. (I have never yet, so help me, God, done a deed I am afraid or ashamed of) and the only way I can privately obtain means will be the following:—At the London end of Kensington gardens (on the Knightsbridge side) there is a dike sloped, which divides the gardens from the park and a carriage road, where the roads meet as you turn to ride or drive across the bridge. It is a short distance from the first lodge, where the keeper remains in the gardens. By looking up that dike you will see large iron pipes, which convey water, &c., to the pond. A large elm

(c) *Ante*, p. 239.

(d) *Ante*, p. 240.

(e) *Rex v. Pickford*, MSS. C. S. G. and 4 C. & P. 227. S. C. 3 Burr. J. D. & Wms. 506. Tindal, C. J., Carrow, B.,

Park, J. A. J., and Bosanquet, J., thought this a letter demanding money with menaces. The other eight judges inclined to a contrary opinion. MS. Bayley, J.

If a letter contain an application for money accompanied by a threat of ill consequences if the money is not given, it is within the statute, though the evil foretold may not proceed from the writer of the letter.

Whether a threat be within the statute or not depends on the general nature of the evil threatened, and not on the nerves of the individual threatened.

tree stands in the middle of this road, betwixt the park and the gardens. There is sufficient room under the first pipe to conceal a small bag. If you will, therefore, send a man you can confide in, and lodge beneath the pipe 250 sovereigns unseen by any mortal eye, I swear most solemnly by Almighty God to prevent the evil, if, when I have completed my task, and inform you all is safe, or denounce the villains, you will let me have 250*l.* more, which, if God prospers me, I will repay with gratitude, as I could not get into business for less than 500*l.*, to obtain a respectable living. Let the money be lodged to-morrow (Saturday) morning, by half-past eleven, but not a moment sooner, and all shall be well with you ; but if I am at all deceived in any possible way all must fall on yourselves,' (f) It was objected that this was not a threatening letter within the statute ; but the objection was overruled : and, on a case reserved upon that question, it was contended that the letter contained no menace from the party writing it, and that the case was not distinguishable from *Pickford's case*. (g) Wilde, C. J., ' " Let the money be lodged to-morrow morning, by half-past eleven, but not a moment sooner, and all shall be well with you ; but if I am at all deceived in any possible way, all must fall on yourselves." Is that not a threat? That is not found in terms at all events in *Pickford's case* : so we need not overrule that decision to support this conviction.' ' We are all agreed that this letter contained such a demand as is contemplated by the statute. There is an application made for money to be given to the applicant, accompanied by a threat of ill consequences if that money is not so given. The writer professes to be cognizant of all the circumstances connected with the evil foretold, and capable of averting them ; and seeks to make the prosecutor part with his money against his will in order to induce the writer to avert the evil. It is said that this is not such a threat as the law will take notice of ; and that it does not come within the rule adverted to by Lord Ellenborough in *Rex v. Southerton*, (h) viz., that it must be a threat attended with duress, or such a threat as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. That rule must be understood to refer rather to the nature of the threat than to the probable consequences in any particular case. Whether a threat be criminal or no cannot be taken to depend on the nerves of the individual threatened, but [must depend] on the general nature of the evil with which he is threatened. Threats attended with duress, or threats of duress, or of other personal violence, or of great injury, such as is imported by this letter, will come within the rule.' (i)

A count alleged that the prisoner sent to A. G. B. Coutts and others, her partners, a certain letter directed to the said A. G. B. Coutts, and others, by the name and description of ' J. Coutts, Esq., Banker, Strand,' demanding money from them with menaces ;

It is a question for the jury to whom the letter is intended to be sent.

(f) The question whether this was a threatening letter within the 7 & 8 Geo. 4, c. 29, s. 8, was treated as a question of law by the judge at the trial, and this was objected to on the case reserved ; but the Court thought the point ought to have been raised on the trial.

(g) *Supra*, note (e).

(h) 6 East, 126, *ante*, p. 232.

(i) Reg. v. Smith, 1 Den. C. C. 510. Wilde, C. J., added, ' This decision does not interfere with that of *Rex v. Pickford*.'

So also  
whether it  
contains  
threats.

another count stated the letter to be sent to A. G. B. Coutts. The letter contained the following passages :—

‘SIR,

‘The most desperate gang in the metropolis have resolved to obtain possession, by whatever means, of a certain portion of your property: it is composed of starving men, and no efforts will be spared in effecting their firm resolves.’ \* \* \* ‘Learning their design upon you, and having further a strong consideration for you, I made every effort to dissuade them, at the risk of personal suspicion and consequent danger, to abolish their intentions as respects yourself: further than this I dared not go; but intense suffering closes the ear of mercy. To remove that suffering is the only way to give access into its natural dictates; they, however, mutually agree that if I will give them a hundred pounds in solid gold, they will relinquish their design upon you; nothing less will satisfy. I communicate to you their demand; and personal safety will, I hope, induce compliance.’ \* \* \* ‘If they receive the sum in question, I am firmly convinced you will never have any cause of fear from them; but if not, non-compliance will hereafter be repented of too late.’ \* \* \* ‘That on Friday night next, at half-past nine o’clock, you will cause a little boy to be stationed at the base of the monument, who shall have in his possession the sum of one hundred pounds in solid gold, encased in boards, so that he shall not be aware of the contents, and deliver the same to the individual who asks for a parcel.’ It was objected that as the letter was directed to J. Coutts there was no proof of its being intended for any of the partners mentioned in the indictment; and that the letter was not a threatening letter within the statute. Maule, J. (to the jury). ‘In the first place, the prosecutor must make out to your satisfaction that this is a letter addressed to A. G. B. Coutts and others, individually or collectively, by the name of J. Coutts, Esq., Banker, Strand. The question is, is it in substance directed to them? I do not think it necessary that the direction should contain the actual name of the partners in the firm; because nothing could then be more easy than to send a threatening letter with perfect impunity. Such a direction might be used as would ensure the paper reaching the parties for whom it was intended, whilst at the same time such a variation might be adopted as would ensure to the writer an acquittal, on the ground of such a variance as is here urged. Evidence has been given that the firm was once T. Coutts & Co., and that none but themselves carry on such a business in the Strand, or in London, by such a style now. It is for you then to say whether the parties stated in the indictment are not those for whom the letter was intended. Secondly, is this a letter demanding money with menaces without any reasonable and probable cause? To ascertain this you must, of course, look to the letter itself, and to the situation of the parties. It may be that, under certain circumstances, an apparently innocent letter may convey a threat. It may be that no letter could be written which it might not be possible to prove by extraneous matter did not contain a threat. Now I can conceive a case where such a letter as this might be written:—“Sir, I trust you are well, and I shall be happy to meet you to-morrow.” There I

should consider myself called upon to withdraw such a letter from the jury, because it would be absurd to say such a letter contained a threat. But as it is impossible I can tell you that this letter may not contain a threat, I cannot decide that it is not a question for the jury.' 'In *Rex v. Pickford* (j) the jury were told that the letter was not a threatening one. They found, therefore, nothing more than that it had been sent by the prisoner, and the Court held that they ought to have decided the whole question. This principle is further illustrated by *Rex v. Tyler*, (k) where a different course was, in the first instance, pursued. The jury were not there told that the letter did or did not contain threats, but its interpretation was left to them. They came to a certain conclusion, and it was upheld by the Court. These two cases, then, show what is the proper course in trials of this kind. Evidence is to be given of the letter sent, and it is for the jury to say whether or not it contains a sufficient threat. At any rate, if that is not the proper mode of proceeding, and the Court are competent to decide that this letter cannot, on any construction, be held to contain menaces, the objection will be on the face of the record, and will be open to the prisoner in arrest of judgment, or by a writ of error.' (l)

An indictment on the 4 Geo. 4, c. 54, for sending a letter threatening to kill and murder R. Collier, set out the letter as follows :—

Letter containing a threat to murder.

'SIR,

'You are a rogue, thief, and vagabond, and if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap it, my banker. Have a care, old chap, or you shall disgorge some of your ill-gotten gains, watches and cash, that you have robbed the widows and fatherless of. Don't make light of this, or I'll make light of you and yours. I am your

'CUT-THROAT.'

'March 15th, 1831.'

It was objected that there was nothing in the letter which imported a threat to kill and murder Mr. C.; it was all hypothetical, and the signature 'Cut-throat' could not be called in aid, for by the statute the threat must be in the letter and not in the signature. And as the words were of ambiguous meaning there ought to have been an innuendo to explain them. But Patteson, J., held that the letter very plainly conveyed a threat to kill and murder, as no one who received it could have any doubt as to what the writer meant to threaten. (m)

The prisoner was indicted under the 4 Geo. 4, c. 54, s. 5, for having feloniously and maliciously, with intent to extort money, charged and accused A. B. with having committed the horrible and detestable crime, &c., and that he feloniously and maliciously did menace and threaten to prosecute the said A. B. The evidence was, that he had threatened to procure witnesses to support a charge already made. It was objected for the prisoner that the

Threatening to procure witnesses to support a charge already made was not a threatening to accuse within the

(j) *Ante*, p. 242. This decision is erroneously stated in this report.

(l) *Reg. v. Carruthers*, 1 Cox, C. C.

(k) *Ante*, p. 241.

(m) *Rex v. Boucher*, 4 C. & P. 562.

4 Geo. 4,  
c. 54, s. 5.

Sending a letter to A., threatening to burn a house of which he is the owner, but let by him to and occupied by a tenant, was not an offence within the 4 Geo. 4, c. 54, s. 3.

Sending a letter to A., threatening to burn the house of B.

Threatening a landlord to burn his house is within the new Act.

Insufficient count alleging sending a letter to A. threatening to burn a house finished by B.

statute applied only to the threatening to accuse prospectively, and that this was at most a threat to support such a charge by evidence. Bayley, J., 'Threatening to procure witnesses to support a charge already made is not within the Act of Parliament, which makes it felony to extort money by threatening to accuse of an indictable offence. It is one thing to accuse, but another to procure witnesses in support of an accusation already made.' (*n*)

The two first counts of the indictment charged the prisoner with feloniously sending a letter to one G. Ley, threatening to burn and destroy a certain house belonging to and the property of the said G. Ley. The third and fourth counts described the house as a certain house in the possession of one T. Elliott, and then belonging to and being the property of the said G. Ley. It appeared that the house was the property of G. Ley, and inhabited by T. Elliott as his tenant, and that the letter was received by G. Ley. It was objected that the two first counts were not proved, as the term 'his' in the 4 Geo. 4. c. 54, s. 3, must have a possessory meaning, and according to the analogy of the rule of law in arson and burglary, the house must be laid as that of the party actually dwelling therein. And as to the two last counts, the offence charged was the sending the letter to G. Ley, threatening to burn the house of T. Elliott, which was held not to be an offence within the repealed clause of the 27 Geo. 2, c. 15, *Rex. v. Paddle*; (*o*) and Maule, J., was of opinion that the offence was not within the meaning of the statute. It must otherwise be admitted that if a party should have any interest whatever in a house, such as a reversion expectant on the determination of a particular estate, however remote or contingent, the house would be sufficiently described as 'his.' As to the other counts, the offence charged was that of sending a letter to A., threatening to burn the house of B., which, according to the case cited, was not within the Act. (*p*)

But where the question was reserved, whether threatening a landlord to burn his house, which was let to a tenant and in his occupation, the Court avoided deciding the question; but Alderson, B., said, 'But for the cases, I should have thought the construction of the statute was "any of the houses of any of Her Majesty's subjects."' (*q*) And it is conceived that such a case would clearly be within the large words of the new enactment, and it is very reasonable that it should; for the injury to the landlord might, and generally would, be very much greater if the house were actually burnt than to the tenant.

An indictment alleged that J. Rowlands had 'finished and completed a house at T,' and that the prisoner sent a letter to T. Lewis, directed to him by the name of 'Mr. T. Lewis,' &c., threatening to burn 'the house so built by the said J. Rowlands.' The letter was in the prisoner's writing, and was found in a cleft stick stuck in the ground close to Lewis's house, and was shown by him

(*n*) Gill's case, 1 Lew. 305. The learned judge seemed to think that a threat to prosecute would amount to a threat to accuse within the meaning of the Act. See *Rex v. Abgood*, 2 C. & P. 436, *post*, p. 253.

(*o*) *Post*, p. 251.

(*p*) *Reg. v. Burridge*, 2 M. & Rob. 296.

(*q*) *Reg. v. Grimwade*, 1 Den. C. C. 30, 1 C. & K. 592.



to Rowlands. Lewis had been tenant of the premises, and after him Rowlands became tenant, and had built a house on the premises. It was objected that the letter was intended for Lewis and not for Rowlands, and that the indictment should have stated that the letter was sent to Rowlands, or that he received it. The jury found that the prisoner sent the letter, intending that it should reach Rowlands as well as Lewis; and, upon a case reserved upon the question, 'whether the prisoner, upon this indictment and these facts, was properly convicted,' the judges were unanimously of opinion that the indictment was bad. (r)

The word 'accuse' in the 7 & 8 Geo. 4, c. 29, s. 7, meant to charge the prosecutor before any third person, and 'threatening to accuse' meant threatening to accuse before any third person. The first count of the indictment was for extorting money by *threatening to accuse* the prosecutor of an unnatural offence; the second count for extorting it by *accusing*, &c. The prisoner accosted the prosecutor, and after intimating to him that he and another person had seen him in the act of committing the offence alluded to, added, 'Well, sir, we don't want to say anything about it; give us our allowance-money, and we will say nothing about it.' The prosecutor gave him five shillings. It was objected that the words proved did not amount to a threat to accuse, or an accusation within the 7 & 8 Geo. 4, c. 29, s. 7. That the word 'accuse' imported a charge made before a magistrate, or some judicial tribunal. But Patteson, J., was clearly of opinion that the words spoken by the prisoner did bring the case within the Act. By the former law it was a felony to extort money by threatening to accuse the prosecutor to any third party; and it was not necessary that the threat should be that of accusing by course of law; and the 7 & 8 Geo. 4, c. 29, s. 7, being declaratory of the former law, could hardly be construed as less extensive in its operation; neither was it necessary to construe the term 'accuse' in two different senses; the term 'accuse' throughout the Act meant to charge the prosecutor before any third person, and 'threatening to accuse' meant to charge before any third person. (s)

The prisoner was indicted for sending to J. H. a letter demanding money from her with menaces. The letter sent by the prisoner to the prosecutrix alluded in threatening and mysterious language to facts injurious to her reputation, and added that if she did not write by twelve o'clock on a certain day, he would explain all to her father, brothers, and friends. The prisoner afterwards sent a letter to the father, in which the prisoner stated that he had received instructions to subpoena his daughter, J. H., as a witness

Meaning of the terms 'accuse,' and 'threaten to accuse,' in the 7 & 8 Geo. 4, c. 29, s. 7.

The words 'without reasonable and probable cause' apply to the money demanded and not to the threats.

(r) Reg. v. Jones, 1 Den. C. C. 218, 2 C. & K. 398, E. T. 1847. In the latter report it is stated that the judges held that the indictment was bad, and that the threat must be to the owner of the property; and that if the letter was sent to Lewis with intent that it should reach Rowlands, and did reach him, it should have been charged in the indictment as sent to Rowlands. It is to be observed that the indictment was clearly

the ground that it neither stated that the house was the property of or belonged to Rowlands, but only that he had 'finished and completed a house,' 'for the future dwelling of himself,' &c.; and the decision that the count was bad may have been on this ground. The new clause would plainly include such a case if the count were properly framed.

(s) Rex v. Robinson, 2 M. & Rob.

against a brothel, which brothel his daughter had frequently visited, during the last two months, in company with an officer. J. H. was too ill to attend as a witness on the trial, and on the part of the prisoner it was suggested that, as the fact of her having gone to the brothel was not negatived, it could not be concluded that the prisoner had not reasonable and probable cause for the accusation he threatened to make; but Rolfe, B. (Williams, J., being present), told the jury that in his opinion the words 'reasonable and probable cause,' as used in the Act of Parliament, applied to the money demanded, and not to the accusation constituting the threat; and that if the lady had in fact gone to the brothel, it would not have made any difference in the case. (t)

An indictment alleged that the prisoner sent the following letter to S. Hill, threatening to burn his houses, barns, ricks, and stacks of grain :—

A letter threatening to burn standing corn is not within the statute.

'It is the provence of the Almighty that is gest com to my knolege aboute your treatment of yourself and whife to the old man yet made him do jest as you like so I warne you shant do jest as you plase with me. If william is so quioiet you shant find it the case with me; let you go wear you like you shore to be found out, you meae think that goine to be safe becose you goine to leve the Lizard; the a specimen of it in Mallion for you to go by. Prapes you mat read of Sampson Ridle and the fox Philistines. If no foxes to bit got thee may somfing in steed. If the not somfing don very shortly you not go onponished. I warne you I not prise you of any more. I think you enjoymment will be very short in this world. Silfeshness will not indoer long.

'I jest let you know wot I meane you; you ben a very great enemy to me; bot by god I not forgit you if my life is spared. Vingens is mine, and I will repaire so shore is a god in heving. So no more.

'JOSEPH MITCHELL.'

There had been incendiary fires in Mallion to houses, barns, and stacks of corn, and a quantity of standing barley had also been burnt. The father of the prosecutor and prisoner had died, and left all his property to the prosecutor, and this had much enraged the prisoner, and they were on bad terms. The prisoner had said that he had not been served fair about his father's property, and that he had written a letter to his brother to frighten him, and get some of the property, and that he had said in it that he would serve him as Sampson did the Philistines, and that Sampson had tied two foxes' tails together, with a firebrand between them, and sent them into the standing corn. Pollock, C. B., held that there was no evidence of any threat to burn, except to burn standing corn. The statement of the prisoner of what he meant by what he had written in the letter, must be taken into consideration in attaching a meaning to that letter, and the allusion to Mallion might well be explained to mean the same thing, as it was shown that standing corn was burnt there as well as houses. The fair construction to be put on the letter was that it

contained a threat to burn the standing corn of the prosecutor, and, if so, that was not an offence within the statute. (*u*)

It was decided that the sending a letter signed with *initials* only, was sending a letter *without a name*, within the 9 Geo. 1, c. 22. (*v*)

In a case where the indictment, which was framed upon the 30 Geo. 2, c. 24, charged the prisoner with sending a threatening letter, intending 'to extort and gain *money*,' it was holden not to be supported by evidence of a letter threatening to accuse the prosecutor of an unnatural crime if he did not give up a certain *bill* drawn by the prisoner, and of which the prosecutor was the holder. (*w*)

In a case where the question arose whether there was sufficient evidence of the prisoner's having sent the letter in question, knowing its contents: the facts were that the prosecutor proved the receipt of the letter by the penny post, at his house, in a street near Berkeley-square, in the county of Middlesex, and his tracing it up to one Elizabeth Robinson, who swore that she was employed in going errands for the prisoners in Newgate, and that having received this letter from the prisoner's hands at the grate at Newgate, she immediately carried it to the post-office in Newgate-street. And the servant of the office-keeper confirmed her account, and both swore to the identity of the letter, the direction being in a remarkable hand. The case was left to the jury, with a direction to consider whether from the prisoner's delivering the letter he knew the contents of it; and the jury, having found the prisoner guilty, the question was submitted to the consideration of the judges, whether there was sufficient evidence to be left to the jury of the prisoner's sending the letter, knowing the contents. The judges held that the conviction was right. (*x*)

The prisoners, who were husband and wife, were indicted on the 9 Geo. 1, c. 22, and the 27 Geo. 2, c. 15, for feloniously sending a threatening letter to their master, demanding 10*l*. The wife wrote the letter, and it was delivered to the prosecutor by the husband, who said he found it in the prosecutor's garden; but there was no evidence that he had any knowledge of its contents. It was objected on behalf of the prisoners that the offence described by the statutes on which the indictment was founded was 'knowingly sending a threatening letter,' whereas the evidence only showed that the wife had written the letter, and that the husband had delivered it, and that there was no proof of its having been sent to the prosecutor. The Court (Ashhurst, J., and Perryn, B.), agreed that merely writing a threatening letter would not constitute the offence within these Acts of Parliament; that carrying a letter could not be comprehended under the word 'send' in the statutes; that the legislature had it not in contemplation that any person would be the carrier of a threatening letter which he himself had written or contrived; and that the act of delivering a threatening letter was not the offence described in

A letter signed with *initials* only, was considered as a letter without a name within the 9 Geo. 1, c. 22.

A charge of an intent to extort *money*, not supported by proof of an intent to extort a bill of exchange.

Sending a letter, knowing the contents.

Where the wife wrote a threatening letter, and the husband carried it to the party threatened, held that the husband, though privy to the writing, was not within the 9 Geo. 1, c. 22, or 27 Geo. 2, c. 15, nor could the wife alone be convicted unless she wrote and sent it without the husband being privy to the contents.

(*u*) Reg. v. Hill, 5 Cox, C. C. 233.

East, P. C. c. 23, s. 3, p. 1118.

(*v*) Robinson's case, 2 Leach, 749. 2 East, P. C. c. 23, s. 2, p. 1110. *Ante*, p. 239.

(*x*) Girdwood's case, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120. *Ante*, p. 240.

(*w*) Major's case, 2 Leach, 742.

those statutes. That if any doubt could be entertained upon that point, the legislature itself had removed it, for by the subsequent Act, 30 Geo. 2, c. 24, the offence of delivering as well as sending a threatening letter was made a misdemeanor, punishable at the discretion of the Court, according to the circumstances of the case. But the Court further observed, that there was still a question for the consideration of the jury; for though M. H. were the wife of the other prisoner, yet if the jury were of opinion that she wrote the letter itself without any intervention of her husband, and sent it by him, without his knowing anything of the contents, to the prosecutor, she alone might be found guilty; but that otherwise both the prisoners must be acquitted. (y)

In a case where the prisoners were indicted for sending a letter, the proof was that the letter was of the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the yard of the prosecutor, from whence it was taken by a servant of the prosecutor, and delivered to him. (z) And in another case the proof was that the letter in question was in the handwriting of the prisoner, who sent it to the post-office, from whence it was sent in the usual manner to the prosecutor. (a) In another case, where it was proved that the prisoner dropped the letter into a vestry-room, which the prosecutor frequented every Sunday morning before service began, from whence the sexton had picked it up, and delivered it to him, Yates, J., said that it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance, by which it might finally come to his hands. (b) And in a subsequent case it was holden that dropping a letter in a person's way, in order that such person might pick it up, was a *sending* of the letter to such person. (c) In a case upon the 27 Geo. 2, c. 15, it was decided, that in order to bring the offence within that clause, it was necessary to prove that the letter was sent to the person threatened; and also that sending it to A., in order that he might deliver it to B., was a sending to B., if it were so delivered. A letter threatening to burn the house of Rodwell, and the stacks of Brook, was sent to Kirby, and the indictment charged the sending it to Kirby. Upon a case reserved, the judges held that a sending to Kirby, as Kirby was not threatened, was not within the statute; and upon that account the judgment was arrested; but they intimated, that if Kirby had delivered it to Rodwell or Brook, and a jury should think that the prisoner

Sending the letter by the post, or by indirect means.

The letter must formerly have been sent to the person threatened.

(y) Rex v. Hammond, 1 Leach, 444.

(z) Rex v. Jepson, 2 East, P. C. c. 23, s. 2, p. 1115. *Ante*, p. 240.

(a) Heming's case, 2 East, P. C. c. 23, s. 2, p. 1116. Chambre, J.

(b) Lloyd's case, 2 East, P. C. c. 23, s. 5, p. 1122. The case was submitted to the judges on another point, on which the indictment was holden to be defective (see *post*, p. 252), so that it became unnecessary for them to give any opinion on the point above stated. In 2 East, P. C. *ubi supra*, the learned writer in note (a) says, 'Qu. whether, if one intentionally put a letter in a place where it is likely to be seen and read by the

party for whom it is intended, or to be found by some other person, who it is expected will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending to *such party*, supposing such an allegation to be necessary upon the true construction of the Acts? The same sort of evidence was given in Jepson's case (*ante*, p. 240) in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground. And the general current of precedents is in the same form.'

(c) Rex v. Wagstaff, R. & R. 398.

intended he should so deliver it, this would be a sending by the prisoner to Rodwell or Brook, and would support a charge to that effect. (d)

A count charged the prisoner with sending a letter to one W. Brown, threatening to burn his house. The letter was left by the prisoner at a gate in a public road near Sir J. Rowley's house, directed to 'Sir Joshua Rowley, Baronet, Stoke, Suffolk.' Having been found there by one of the witnesses, it was forwarded by him to Sir J. Rowley's house, and there deposited in the steward's room, and there opened by the steward, who read it, but instead of delivering it to Sir J. Rowley, he handed it to a constable, who afterwards showed the letter both to Sir J. Rowley and Brown, who occupied a house under Sir J. Rowley, under an agreement, two years of which remained unexpired. Alderson, B., directed the jury to consider whether, in leaving the letter as before described, the prisoner intended that it should not only reach Sir J. Rowley, to whom it was directed, but that it should also reach Brown, and then, if they thought so, the learned Baron was of opinion that would be a sending to Brown; and the jury having convicted, upon a case reserved, the judges were of opinion that the conviction was right. (e)

The prisoner was indicted for sending a threatening letter to the prosecutor. The letter was proved to have been affixed to a gate in a public highway, near which the prosecutor would be likely to pass from his house; and Cresswell, J., held 'that if it were proved that the prisoner wrote the letter and affixed it on the gate, it was a question for the jury whether he did so with an intent that it should come into the prosecutor's hands; for, if so, it would be a sending.' (f)

Where a prisoner was indicted under the 4 Geo. 4, c. 54, for sending a threatening letter to the prosecutor, and the only evidence against him was his own statement that he should never have written the letter but for W. Goodes; Lord Abinger, C. B., held that there was no evidence of the prisoner having sent the letter; as upon this evidence Goodes might have taken the letter or might have sent it himself, having made the prisoner write it; and there was no evidence of the prisoner having directed Goodes to take it. (g)

One count charged the prisoner with sending a letter to the prosecutrix threatening to kill her; another with uttering the same letter. The prisoner was seen by a witness to put a small brown paper parcel containing the letter under the table-cloth in the kitchen of the house where both the prisoner and prosecutrix were in service. The witness afterwards lifted up the cloth, and found the parcel, and the letter in it. The witness gave the parcel to the prosecutrix, to whom the letter was directed. It was contended that there was neither a sending of the letter, nor an uttering of it to the prosecutrix. It was answered that there

If a threatening letter be directed to A., but the evidence satisfies the jury it was intended to reach the hands of B., whose house it threatens to burn, this supports a count charging a sending to B.

Affixing a letter to a gate.

Evidence of sending a letter.

What is an uttering.

(d) *Rex v. Paddle*, R. & R. 484. See *Reg. v. Burridge*, *ante*, p. 246.

(e) *Reg. v. Grimwade*, 1 Den. C. C. 30, 1 C. & K. 592. In the latter report Alderson, B., said, 'The whole act of the prisoner ceased when he left the letter; and if he left the letter with intent that

it should go on, that is a sending it; and what the constable did with it afterwards, I think, is immaterial.'

(f) *Reg. v. Williams*, 1 Cox, C. C. 16. This would clearly be an uttering within the new Act.

(g) *Rex v. Howe*, 7 C. & P. 268.

was a sending, or, at all events, an uttering, as there could be no doubt the prisoner placed the letter on the table for the purpose of its reaching the prosecutrix by some means; and Patteson, J., held that there was no evidence of an uttering. (*h*)

The indictment must set forth the letter.

It was decided, upon reference to the judges, that it was necessary to set forth the threatening letter in the indictment, in order that the Court might see whether it fell within the purview of the respective statutes. It was contended, in support of the indictment, upon which the point was raised, that it pursued the words of the 9 Geo. 1, c. 22 (now repealed); that the defendant was charged with sending the letter 'feloniously and contrary to the form of the statute;' and that those words imported that the letter was of such a nature as the statute had in view. But the judges were of opinion that the indictment was bad in not setting forth the letter itself: and that if the words, 'feloniously and contrary to the form of the statute,' were allowed to supply the place of the letter, it would be leaving it to the prosecutor to put his own interpretation upon it, and to the jury the construction of the matter of law. (*i*)

The indictment need not state the ownership of the property attempted to be extorted.

Where some counts charged the prisoner with threatening to accuse the prosecutor of an infamous crime with intent to extort from him a valuable security for the payment of fifty pounds, and others laid the intent to be to extort money from him; Platt, B., held that the indictment was good, though it did not allege whose property the security or money was. The term 'extort' has a technical meaning, and the very import of the word shows that the prisoner is not acquiring possession of his own property: and in this case, whether anything is obtained or not, the crime is complete, and therefore, whether the property belongs to the person threatened or not, is quite immaterial. (*j*)

The indictment must aver from whom the money was demanded, and who was threatened to be accused. Indictment for threatening to prosecute a charge already made, insufficient.

But the indictment must aver *from whom* the money, &c., was demanded; and if the indictment be for threatening to accuse, &c., it must allege *who* was the person threatened. (*k*)

An indictment on the 4 Geo. 4, c. 54, s. 5, charged that the prisoners did feloniously, with intent to extort money, charge and accuse J. N. with having committed the horrible and detestable crime, &c., and did feloniously, with intent to extort, &c., menace and threaten to prosecute the said J. N. for the said pretended offence; it was objected that the charge contained in the indictment was not within the terms of the 4 Geo. 4, c. 54, s. 5, which applied only to threatening to accuse prospectively, and not to a threat to prosecute a charge antecedently made; and Garrow, B., after consulting Burrough, J., held that the objection must prevail. If the indictment had followed the terms of the statute, and it had been proved that the prisoners had threatened to prosecute

(*h*) Reg. v. Jones, 5 Cox, C. C. 226. Patteson, J., took time to consider whether he would reserve the question, but did not do so, as he was satisfied he was right in his opinion. It must not be assumed that Patteson, J., held that there was not a sending. In passing sentence he said, 'Your learned counsel has stated some difficulties in point of law. I do not think there are any.'

(*i*) Lloyd's case, *ante*, p. 250, note (*b*). And the law of this case was recognized by Grose, J., in delivering the opinion of the twelve judges in Hunter's case, 2 Leach, 631.

(*j*) Reg. v. Tiddeman, 4 Cox, C. C. 387.

(*k*) Rex v. Dunkley, R. & M. C. C. 90.

J. N., the case would have been left to the jury to say whether that was not a threatening to accuse them. But the offence laid in the indictment was not sufficiently charged under the statute. (*l*)

It was also held to be necessary that the indictment should allege an intent of the writer in sending the letter consistent with and deducible from the letter itself. In a case already mentioned, where the indictment charged that the letter was sent to extort money, and it appeared upon the face of the letter that it was sent with the view of inducing the prosecutor to give up a bill of exchange, the judges held the allegation not to be sustained. (*m*)

The intent of the writer should be alleged correctly.

If the indictment state the offence of which the prisoner threatened to accuse the prosecutor, it must state it correctly. There were several counts in an indictment, charging the prisoner with threatening to accuse the prosecutor of the crime of sodomy, and it appeared to Littledale, J., that the letter written by the prisoner only imputed to the prosecutor that he had solicited the prisoner to permit him to commit that crime; he therefore directed the jury to acquit the prisoner on those counts. (*n*)

Variance in the crime alleged to have been threatened.

In prosecutions under the new Act where the prisoner is charged with *demanding* money, &c., by menaces, &c., with intent to steal, it should seem that an actual or express demand by words is not necessary. On indictments on the 7 Geo. 2, c. 21, for assaulting, and by menaces, &c., demanding money, &c., with intent to rob, it was the better opinion that an express demand of money by words was not necessary; and that the fact of stopping another on the highway, by presenting a pistol at his breast, was, if unexplained by other circumstances, sufficient evidence of a demand of money to be left to the jury. It was observed that the unfortunate sufferer understood the language but too well; and the question was put, 'Why must Courts of justice be supposed ignorant of that which common experience makes notorious to all men?' (*o*) And in one case upon that Act the Court appears to have considered that an *actual demand* was not necessary; and that whether there was a demand or not, was a fact for the consideration of the jury under all the circumstances. (*p*)

Where a demand is necessary, an actual or express demand by words is not necessary.

The prisoner applied to the prosecutor for work, and being refused he asked for a shilling, and being again refused, he became very abusive, and threatened 'to burn up' the prosecutor. He then went into a neighbouring stack, and knelt down close to it, to strike a lucifer-match; but, discovering that he was watched, he blew out the match and went away. No part of the stack was burnt: and on an indictment for attempting to set fire to the stack, the jury were not satisfied that he intended to set fire to the stack, but they thought that he intended to extort money from the prosecutor by his conduct, and an acquittal was directed; but the prisoner was ordered to be detained on the charge of demanding property with menaces, on the ground that, assuming the finding of the jury to be correct, the prisoner was liable upon such a charge under the 1 Vict. c. 87, s. 7. (*q*)

Menaces by pretending to set fire to a rick.

(*l*) *Rex v. Abgood*, 2 C. & P. 436.  
See *Gill's case*, 1 Lew. 305, *ante*, p. 246.

(*m*) *Major's case*, *ante*, p. 249.

(*n*) *Rex v. Hickman*, R. & M.

(*o*) 1 East, P. C. c. 8, s. 11, p. 417.

(*p*) *Rex v. Jackson*, 1 Leach, 267.

(*q*) *Reg. v. Taylor*, 1 F. & F. 511.

*Pollock, C. B.*, after consulting Cock-

A threat to make known to his parish-ioners and others that a clergyman had committed fornication is a menace. It is for the jury to determine whether a menace has been made without reasonable and probable cause.

The prisoner was indicted for delivering to C. H. Marsh letters demanding of him 10,000 francs, being of the value of 400*l.*, with menaces and without reasonable and probable cause. The originals in French were thus translated :—

‘The bearer of this note is ignorant of all. I am in Stamford, and as you have neither answered my prayers nor my threats, I have considered that it was better to come as far as here, for you would not answer me without doubt at London. I have eight letters to restore to you, which are very compromising; for there are some of them old ones. (I see the bottom of your heart.) Well! in spite of that, if I had not really need of money to continue that which I have commenced, which is really above my means, I would not ask you anything to-day; but it is for me a question of life or death; I must have 10,000 francs. See that which you have to do! When I have told you that I loved you, it was true and sincere. Well, in spite of the hatred which I experience, it causes me pain to demand them of you. I return entirely the promises you have made about your uncle, and wish not for the future to hear speak more of you; for with all the sacrifices that you have made for me, the heart neither being for nothing, that cannot make me forget that which you have made me suffer. There is my address :—

‘Hotel of the Port, Stamford.

‘N. MIARD.’

‘Thursday, April 16, 1843.’

‘P.S. Recal to yourself these words, “With me peace is better than war.”’

‘The person who carries this note to you was ignorant of all yesterday; and as I have not had an answer the person knows all to-day. You may therefore answer him verbally, without fear of compromising yourself further. As I am not false, I ought not to let you be ignorant of that which I have the intention of doing, in case you should not satisfy my demand. This is the plan which I have conceived, and I swear to you I will put it in execution. Firstly, I will go into your church on Easter Sunday, and, reckoning from that evening, I will go into your village, from cottage to cottage, to inform them all of that which has passed. Afterwards I will go to the magistrate at Stamford, from clergyman to clergyman at Peterborough, to all the chapter, and the bishop. I will take afterwards the names of all the bishops of England, and I will write to them all. From there I will go to London, and cause you to be inserted in all the newspapers; afterwards I will go to find the Archbishop of Canterbury, who, being equally instructed, and I will go again to London to the magistrates, and I shall know how to find Clarisse, that she may do so as well as me. I may not be more rich for it; but at least I shall be revenged for all that you have made me suffer.’

‘Friday Morning, Standwell’s Hotel, Stamford.’

‘N. MIARD.’

‘Yesterday I gave you my address incorrectly, but now you cannot make a mistake.’

It appeared that a criminal intercourse between the prosecutor,



who was rector of B. and a prebend of P., and the prisoner, had commenced at a house of ill-fame in London, and been renewed in Paris, and subsequently in London again, and the prisoner had received at different times 1,200*l.* from the prosecutor. Tindal, C. J., after referring to the words of the 7 & 8 Geo. 4, c. 29, s. 8, applicable to the case, told the jury 'that parts of this offence have been made out, is perfectly clear; that a letter was sent by the prisoner to the prosecutor making a demand of money with menaces, there is no doubt; what you will have to say therefore is whether that was done without reasonable and probable cause; for it is admitted that the menaces contained in these letters are such as are contemplated by the Act; and indeed the threat of exposing a clergyman, who has been guilty of great vices, in his own church on the most solemn day of the year, of publishing his conduct afterwards to every rank of society in his own neighbourhood, and also of spreading his disgrace more publicly still, can scarcely be said to be such a threat as not to require more than ordinary firmness to resist it; and therefore, according to the proper test laid down by Lord Ellenborough, (*r*) to be such as not to fall within the meaning of this Act. But the main defence is that there was some just and reasonable ground for the demand made in this case, or that the prisoner at least truly and honestly believed that she had just and reasonable cause for making it; and that is the view which I recommend you to take in applying this evidence. Ask yourselves the question whether this demand was made at a time when the party making it really and honestly believed that she had good and probable cause for making it.' (*s*)

The prisoner was indicted for demanding money with menaces from J. Bradshaw, and a second count charged a larceny of money. J. Bradshaw owed Stainforth upwards of two pounds for rent, and his agent signed an authority to Oldfield, a bailiff, to make a distress for that rent. The agent's clerk went with the warrant to Oldfield's deputy, and they and the prisoner, a self-appointed bailiff, went to Bradshaw's house, which was locked up. The authority was returned to Oldfield, who gave no instructions or authority to the prisoner to proceed in the matter of the distress; afterwards the prisoners went to Bradshaw's house, and demanded the rent due to Stainforth, stating that if it was not paid they had a warrant from a magistrate, and would break open the door and make the distress; but that if Bradshaw would pay them five shillings and sixpence for expenses, and sign an I O U for the debt, payable by instalments, they would be satisfied. One of the prisoners shook the door of the house. Bradshaw hesitated, and one of the prisoners left and returned with a policeman. Nothing was said as to what the policeman was to do. The policeman did not speak to Bradshaw. The policeman had only been told that the prisoners had a distress to make. After the appearance of the policeman Bradshaw agreed to pay the five shillings and sixpence, and paid them that sum. He believed that they had authority to distrain. It was objected that no such menace as was contemplated by the 24 & 25 Vict. c. 96, s. 45, was proved, and as to the

What are sufficient menaces.

(*r*) In *Rex v. Southerton*, 6 East, 126, ante, p. 232.

(*s*) *Reg. v. Miard*, 1 Cox, C. C. 22.

The evidence on which the question was left to the jury is not stated. See *R. v. Chalmers*, 10 Cox, C. C. 450.

second count that, if any offence was proved, it was obtaining money by false pretences. The objections were overruled, and the jury were told that the words and conduct of the prisoners, if they believed the facts, constituted a menace within the meaning of the statute. The jury said that they considered the statement made by the prisoners that they had a warrant signed by a magistrate (which was untrue), supported by their procuring a policeman to give them a supposed authority to break into the house, and showing the intent by violently shaking the door, was a menace within the meaning of the Act, and found both prisoners guilty generally; and, on a case reserved, *Wilde, B.*, after argument, delivered judgment. 'The question turns upon the proper construction of the 24 & 25 Vict. c. 96, s. 45. There are many demands for money or property accompanied by menaces or threats, which are obviously not criminal nor intended to be made so. Thus in a case of disputed title to personal property, a man may threaten his opponents with personal violence if he does not relinquish the subject of the dispute, and he would not be within the intention of the statute. (t) Other instances would offer themselves to a little consideration. Where, then, is the proper limit to the operation of this section? It is to be found in the words "with intent to steal." There is no other restriction expressed. Nothing is said about "violence" in conjunction with menaces, still less of violence to the person as distinct from violence to property. There is no express limit, except in the words "with intent to steal." Now a demand of money with intent to steal, if successful, must amount to stealing. It is impossible to imagine a demand for money with intent to steal, and the money obtained upon that demand, and yet no stealing. (u) The question then arises, what are the incidents attending the procurement of money or property by menace or threats necessary to constitute stealing? It is said in *East*, (v) "the taking must in all cases be against or without the consent of the owner to constitute larceny or robbery." On the other hand, it is said at the same place, "a colourable gift, which in truth was extorted by fear, amounts to a taking and a trespass." These two passages, when taken together, appear to define the offence of stealing in the case of menaces. For if a man is induced to part with property through fear or alarm, he is no longer acting as a free agent, and is no longer capable of the consent above referred to. Accordingly, in the cases cited in the argument, (w) the threatened violence, whether to person or property, was of a character to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent. Now to apply this principle to the present

(t) This is a faulty illustration. The case would not be within the statute because there would be no intention to steal, however violent the menaces might be. C. S. G.

(u) This is a manifest error. If a man makes a frivolous demand of money without any pretence of legal title, and

thereby obtains the money, this is clearly no larceny. C. S. G.

(v) 2 *East*, P. C. c. 16, s. 3, p. 555.

(w) *Rex v. Parfait*, 1 *East*, P. C. c. 8, s. 11, p. 416. *Simons' case*, 2 *East*, P. C. c. 16, s. 131, p. 731. *Taplin's case*, 2 *East*, P. C. c. 16, s. 128, p. 712.

case a threat or menace to execute a distress warrant is not necessarily of a character to excite either fear or alarm. On the other hand, the menace may be made with such gesture and demeanor, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect; and this should be decided by the jury. Now in this case there was evidence very proper to be left to the jury to raise the above question. But the chairman left no such question to them, and directed them as a matter of law that the conduct of the prisoners (if believed) constituted a menace within the statute. Our judgment that this conviction cannot be sustained, is founded entirely on this ground. (x)

If a person with menaces demanded a sum of money from another, and that other did not give it him, because he had it not with him, it was within the 7 & 8 Geo. 4, c. 29; but if the person demanding the money knew that the money was not then in possession of the party, and only intended to obtain an order for the payment of it, it was otherwise. (y)

The first count charged the prisoner with accusing the prosecutor of having made a solicitation to him, whereby to induce him to commit with the prosecutor the crime of b——, with a view to extort money from the prosecutor. The second count charged the prisoner with having accused the prosecutor of having made a solicitation to him, whereby to induce him to permit the crime of b—— to be committed by the prosecutor. About half-past ten at night the prisoner, dressed in a soldier's uniform, accosted the prosecutor as he was passing down Hemming's Row, endeavoured to whisper to him, and stooped and asked what hour it was, and, receiving for answer, 'I don't know exactly, but it is past ten,' attempted to whisper several times again, but, the prosecutor drawing back, what the prisoner said in such whispers was inaudible. The prisoner followed the prosecutor for a considerable time, through Green Street, Leicester Square, Panton Street, into Jermyn Street, and into the Haymarket, Piccadilly, and the Regent Circus, and when asked by a person, who interfered for the protection of the prosecutor in Piccadilly, 'What do you mean by annoying this gentleman?' the prisoner replied, 'I know what I mean.' The prosecutor on getting into Regent Circus applied to a policeman to take the prisoner in charge for following and annoy-

If money be demanded with menaces, that is sufficient, though the party menaced have no money with him.

As to the sufficiency of evidence to prove an accusation of an infamous crime.

(x) *Reg. v. Walton*, L. & C. 288. No notice was taken of the question raised on the second count. This decision requires reconsideration, as it obviously proceeds upon the fallacy of supposing it necessary that the menaces should be such that if property were obtained by them the offence would be larceny. Now the words of the clause warrant no such construction. The words are 'whosoever shall by menaces, or by force, demand any property, &c., with intent to steal the same.' Any menaces or any force, therefore, clearly satisfy the terms of the clause, provided there be an intent to steal. It might just as well be said that, on an indictment for an assault with intent to rob, or for wounding with intent to murder, it was necessary to prove that an assault in the one case, or such a

wounding in the other, as would be sufficient to effectuate the intent, and yet it has never been doubted that any assault, however slight, or any wound, however trivial, was sufficient, provided the intent were proved. In truth the criminality in these cases depends on the intent. The effect of this decision is to render the clause almost inoperative; for where the menaces have not obtained the money, it is plain a jury will be very reluctant to find that they were sufficient to obtain it. The whole offence consists in the acts and intent of the prisoner; and it is quite beside that to consider what the effect on the prosecutor might be. See *Reg. v. Robertson*, *infra*. C. S. G.

(y) *Rex v. Edwards*, 6 C. & P. 515. *See also* *Reg. v. Robertson*, *infra*.

ing him, and at the same moment the prisoner ran up, and said, 'I charge this person with making an indecent assault on my person.' He afterwards explained this by stating, 'This man came up to me in Orange Street, where I was standing at a watering-place making water, and, putting his hand round a stone, which stood between me and an adjoining urinal, took hold of my private parts.' The same charge was preferred at the station-house, and also before the magistrate, with the addition given in italics below. The prisoner's charge before the magistrate was as follows:— 'Between ten and eleven o'clock last night I was proceeding towards my barracks down Orange Street. I had occasion to stop at a watering-place: while so doing the defendant (prosecutor) came into an adjoining watering-place; there is a partition; he looked round at me; then he put his hands round and caught hold of my private parts. *I said, "What do you mean by that, you d—d old scoundrel?" He made answer, "Don't make a noise for God's sake," and left the place immediately.* I followed him. He went into a tobacconist's shop; he came out in two or three minutes, caught hold of a young man's arm, and they walked on. He said to me, "Which way are you going?" I made him no answer. He stopped, and said, "I am going the reverse way to you." He turned round to the right; I still followed him; he stopped, and asked me what I was following him for. I told him I wanted to get a constable; he turned back again; I followed him to Regent Circus, when I gave him in charge.' On cross-examination he said, 'I made a charge on the 12th of July last against a gentleman named Williams of a similar nature. I never made any other charge of this sort against any person; I have never been summoned to appear against Williams.' According to the evidence the prosecutor had not been in an accommodation-place that evening with the prisoner or any other person, but being followed by the prisoner, and observing a cigar shop, he inquired where he could find a policeman; the prisoner was at that time looking in at the window of the cigar shop, and afterwards continued his annoyance to the prosecutor by following him when he came out of the shop. A young man upon this volunteered his protection to the prosecutor, and put the question before mentioned to the prisoner. The jury convicted, and, upon a case reserved upon the question whether there was sufficient evidence to go to the jury, and to sustain the verdict on the said two counts, which alleged a solicitation to commit a capital offence in the express terms of the statute, the prisoner's counsel contending that the evidence only proved a charge of an indecent assault, the judges were unanimously of opinion that, if the charge were confined to the charge before the magistrate, it could not be with intent to obtain money. But five of the judges (z) thought that the previous conduct of the prisoner, coupled with the charge (before the magistrate) was sufficient evidence for the jury to convict the prisoner on this indictment. Seven of the judges (a) thought otherwise. (b)

(z) Lord Denman, C. J., Tindal, C. J., Erle, J., Wightman, J., and Williams, J.

(a) Pollock, C. B., Alderson, B., Rolfe, B., Coltman, J., Patteson, J., Coleridge, J., and Cresswell, J.

(b) Reg. v. Middleditch, 1 Den. C. C. 92. There was a third count, which merely charged the prisoner with accusing the prosecutor of a certain infamous crime with intent to extort money; as to which the prisoner's counsel contended—

On a count charging the prisoner with having accused H. C. S. of having solicited him to commit an infamous crime, it appeared that the prosecutor had taken shelter from the rain under a portico of Buckingham Palace, and that the prisoner, who was a sentry on duty there, after some conversation, had seized the prosecutor and charged him with having indecently touched or assaulted him, and then took him to the guard-house and said, 'I charge this man with indecently assaulting me.' When the case was heard before the magistrate the prisoner stated that the prosecutor caught hold of his private parts. It was contended that this was a charge of assault and not of solicitation; and as the Act had both 'assault' and 'solicitation,' they were intended to be different things: the one an act done; the other a solicitation, in its strict sense. Cresswell, J., 'Suppose the case of an assault with intent to commit a rape; that means an assault made with an intention to use force and to commit a rape if possible: but it often happens that a very indecent assault is committed with no intention of resorting to further violence, if resistance is offered, but merely in the hope that the woman's scruples may be overcome. Now, supposing that a man's soliciting a woman to yield her person to him was an offence, might not such an indecent assault, committed for such a purpose, be treated as a solicitation, in case the evidence fell short of proving an attempt to commit a rape? In short, may there not be a solicitation by deeds as well as by words?' And after holding that neither the charge made at the guard-house nor before the magistrate could be taken into consideration, because neither could have been made to extort money; Cresswell, J., said, 'I think that, although the prisoner charged the prosecutor in terms with an assault, throughout the transaction and afterwards, yet it was with an assault of such a character and made under such circumstances that it might be taken to mean a solicitation. It is a question which the jury must determine.' (c)

One count charged Braynell and Wren with threatening to accuse the prosecutor of an assault with intent to commit an abominable crime; another of an attempt to commit such a crime; two others of a solicitation to commit and permit, &c. Four other counts alleged that the prisoner did accuse the prosecutor as in the first four counts, and the last charged the prisoner with a demand of money, with menaces, &c. The prosecutor was looking into a shop-window, and felt some one press against him, and, on looking round, saw Braynell, who a moment afterwards pressed his private parts against the prosecutor's hand. He immediately walked away, and Braynell followed him, and asked what he meant by taking indecent liberties with him. Wren was

Evidence of a solicitation to commit a crime.

It is for the jury to decide what the accusation was which the prisoner intended to make.

Examinations before the justice are admissible, but not cross-examinations.

whether in arrest of judgment or not does not appear—that it was insufficient; for that, although the legislature had defined what it includes under the terms 'infamous crimes,' yet this did not excuse the prosecutor from particularising the specific charge. The report does not expressly state the decision of the recorder upon this point, but it seems that he must have held the objection good; as he reserved for the opinion of the judges the further question, 'whether a

general judgment upon the finding of the jury on the whole indictment is rendered void or voidable by the insufficient statement of the offence charged in the third count;' but the decision of the other question rendered it unnecessary to consider this question.

(c) *Reg. v. Cooper*, 3 Cox, C. C. 547. See this case, *ante*, vol. 2, p. 111, as to the admissibility of a previous charge made by the prisoner against another person.

then present. The prosecutor denied that he had done what was alleged. Braynell said, 'Do you think that I would allow you to do that for nothing?' He then asked what the prosecutor would stand, and suggested that they should go into a public-house to settle it. The prosecutor refused. Braynell said he must take the consequences. The prisoner shortly afterwards gave the prosecutor into the custody of a policeman who came up, and he was taken to the station, where Braynell signed the following charge: 'Indecently assaulting J. Braynell at Hemming's Row,' &c. Wren signed it as a witness. The next day the prisoners were examined as witnesses before a magistrate, when the charge was gone into, and were cross-examined in the absence of each other, and the charge dismissed. Williams, J., held that the examinations in chief of the prisoners were admissible in evidence against them, as they were then under no charge, and were not bound to say anything to criminate themselves. The cross-examination of Braynell was principally directed to ascertain how he had employed himself, and whether he and Wren had been together on the day in question; and his answers were not only contradictory in themselves, but quite inconsistent with those of Wren, when he was afterwards cross-examined. (d) Williams, J., held that the cross-examinations were not admissible. It was no doubt most material that these questions should have been asked before the magistrate, because it was most important to ascertain the amount of credit to be attached to the evidence of the prisoners, but no such connection between these answers and the particular charge in this indictment could be perceived as would justify their being held to be relevant. (e) It was then objected that the evidence did not support the first eight counts, as the evidence only showed a charge of an attempt to commit an indecent assault. But Williams, J., held that it was for the jury to say, judging from the prisoners' whole conduct, what was the accusation that they intended to make. (f)

It is for the jury to determine whether there was an intent to extort.

Where the prisoner was indicted for sending a letter to the prosecutor threatening to accuse him of an infamous crime with intent to extort money, Martin, B., told the jury that the question for them to determine was whether the prisoner intended to extort money, and that it was nothing that he denied it, if his own acts and conduct, and his meaning, as indicated by his letters, plainly proved that such was the real object. That was the sole question: the truth of the charge did not matter. (g)

Evidence as to what the prosecutor

The prisoner was indicted for sending to the prosecutor the following letter, threatening to burn and destroy his houses, &c. :—

(d) Williams, J., looked at the depositions to ascertain the nature of the cross-examinations.

(e) With all deference this ruling seems to be erroneous. The material question on the trial of this indictment was whether the prisoners had made a false charge, and it was most material to ascertain all that they had said, which showed their evidence before the magistrate to be false. If they had made the same statements elsewhere, it cannot be

questioned that they would have been evidence, and their being made before the magistrate could make no difference, unless there had been any such undue influence used as would exclude them. The truth of the evidence of the prisoners in chief was just as much in issue before the jury as before the magistrate. C. S. G.

(f) Reg. v. Braynell, 4 Cox, C. C. 402.

(g) Reg. v. Menage, 3 F. & F. 310.

‘SIR,

‘This is to inform you that you are better not let your farm to any of your family; if you do, you will suffer as before. You know how felt the other day.

understood the letter to mean.

‘A CAUTION FRIEND.’

It was proposed to ask the prosecutor what he considered was the meaning of the letter, and on this being objected to, Erle, J., said, it appeared to him that the answer to the question was admissible. The offence intended by the statute was a threat to burn the premises, and that threat must be in writing, and the thing intended to be prevented was the misery occasioned to the party who had received the intimation that his premises would have the calamity of fire brought upon them. Unless the law went so far as to make it punishable to create that fear by any language the author knew would create that fear, the law would be powerless. The very fact of saying ironically, ‘I don’t say you are a thief,’ could be expressed in such way as to make anybody understand that the party meant to make that charge; and, although there might be no single word in the letter which by itself would appear to mean so to a stranger, yet the party receiving it would perfectly well understand it. The jury must be satisfied that when he wrote those words—‘You will suffer as before’—the writer intended to create in the mind of the party receiving the letter the fear that his house would be burnt down. Evidence might be offered that, under the particular circumstances, the words had not their ordinary meaning, but the meaning imputed to them upon the record, and therefore the witness might be asked whether he understood the meaning to be that which the record imputed. (*h*)

The prosecutor may be asked what he understood the meaning of the letter to be.

The 9 Geo. 1, c. 22, provided that offences against that Act might be tried in any county of England; but no such provision being made with respect to offences within the other repealed statutes, the trial of such offences was governed by the general rule. Upon this rule the trial might be in the county in which the prosecutor received the letter by the post, though delivered by the prisoner and put into the post in another county. (*i*) And it seems that the offender might be tried in the county in which he sent the letter, though the prosecutor received it in another county. The offence of *sending* a threatening letter, would seem

Place where the offence may be tried.

(*h*) *Reg. v. Hendy*, 4 Cox, C. C. 243. Mr. Moody gave me this note of this case: an indictment averred that a fire of certain premises of the prosecutor had taken place, and that the prisoner sent a letter threatening to burn the house, &c., of the prosecutor, which was set out, and to the words, ‘you shall suffer as before’ added, ‘meaning the said fire;’ and Erle, J., allowed the prosecutor to be asked ‘what meaning he, at the time he received the letter, put on these words?’ C. S. G.

(*i*) *Girdwood’s case*, 1 Leach, 142, 2 East, P. C. c. 23, s. 4, p. 1120, *ante*, p. 240, where the letter was *received* by the

prosecutor in Middlesex, and the trial had in that county, though the letter was delivered by the prisoner to a woman in London, and by her put into the office, which was also in London. *Esser’s case*, 2 East, P. C. c. 23, s. 7, p. 1125, where the offence was laid in Middlesex, though the letter was dated from Maidstone, in Kent, and sent by the post from Maidstone; and Lord Mansfield held that as the letter was directed to the prosecutor in Middlesex, where it was delivered, that was a sending in Middlesex, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county.

Post-office  
marks.

On an indictment for sending a threatening letter, the prisoner's declarations of the meaning of the letter are admissible in evidence. An indictment on the 4 Geo. 4, c. 54, for sending a letter threatening to accuse of an infamous crime, need not have specified such crime, for the specific crime the prisoner threatened to charge might intentionally be left in doubt. (m)

to be complete, as far as depends on the offender, by his putting the letter into the post-office to go into another county; though the party to whom it is sent afterwards receives it in the latter county. (j) The post-office marks in town or country, proved to be such, are evidence that the letters on which they appear were in the office to which those marks belong at the dates which the marks specify; (k) but a mark of double postage paid on any such letter is not of itself evidence that the letter contained an inclosure. (l)

The prisoner was tried for feloniously sending to J. S. Tucker the following letter, with intent to extort money from the said J. S. Tucker:—

‘SIR,

‘You perhaps did not expect to hear from me so suddenly; but when you turned me away from Laytonstone for a mere trifle (that too at a time when by the late failures many scores of clerks were out of employ), you forgot that I had you in my power through your transactions with me five nights following (I have the dates and circumstances on paper written at the time), and that from your conduct to me before I went to live with you, you could expect no mercy from me. Did you not, however, let it pass? In a few words, I have taken advice upon the subject, and know that, if you are obstinate, it is in my power to bring down *ruin* on your head, and infamy on your name. However, I will be merciful. Allow me to return to L. in the same manner as before. I will never mention it again, as if I did I should lose everything, and gain nothing; but it is impossible for me to get any situation in town at present. It is not true that Mrs. T. advertised, as you said; she is in great distress, and she is my mother, therefore I would wish to afford her a little relief, if possible; so send me five pounds to my address, which, with the other you lent me, I will I O U for, and pay when I get a place. If I do not hear from you by Saturday morning, you will hear of it (enclosing five pounds). Now, consider ruin and beggary on one side, and wealth and comfort on the other; remember that, if you are obstinate, it will cost you *all*; do as I say, it will cost you nothing. I wait your answer before I proceed. As yet, I have given Mr. Norris no names. On Saturday night (if you are silent) I will go too far to retract.

‘Your’s obediently,

(Signed) ‘JAMES TUCKER, Junr.’

The second count charged the prisoner with threatening to accuse the said J. S. Tucker of a certain infamous crime, viz., with attempting and endeavouring to commit the abominable crime of sodomy with the said J. S. Tucker. with the same intent. The third count charged him with threatening to accuse the said J. S. Tucker of an infamous crime, with the same intent. The fourth,

(j) 2 East, P. C. c. 23, s. 7, p. 1125. Burn. Just. tit. *Letter*. And see now the 7 Geo. 4, c. 64, s. 12, vol. 1, p. 5.

(k) Perkins's case, 1 Lew. 99, Park, J. A. J. Rex v. Blunt, 13 M. & W. 505.

(l) Rex v. Plumer, R. & R. 264.

(m) This is the marginal note to the case in R. & M. C. C. R., but it does not appear that any such point was reserved or decided, although such a point might have arisen on the third and sixth counts. C. S. G.



fifth, and sixth counts were the same as the former, except that the letter was called a paper-writing, and the direction omitted. The third and sixth counts did not describe the specific crime, but alleged, generally, an infamous crime. All the counts concluded against the statute, &c. The prosecutor, after proving the letter in question, said, that on the Saturday following the Thursday on which he received the letter, he saw the prisoner at a public-house in the Strand, and that he, the prosecutor, asked him what he meant by sending him that letter, and what he meant by 'transactions five nights following.' The prisoner said that the prosecutor knew what he meant. The prosecutor denied it; and the prisoner afterwards said, 'I mean by taking indecent liberties with my person.' The prisoner, in cross-examination, asked the prosecutor whether on his oath he could deny that he did take indecent liberties with his (prisoner's) person. The prosecutor said he never did. Alexander, C. B., submitted the following question to the judges, whether parol evidence to explain the letter was properly received? Adding, that without it the prisoner could not have been convicted, and that by his cross-examination he in effect repeated the charge. And all the judges (except Littledale, J., who was absent), were unanimously of opinion that such evidence was properly received, and that the conviction was proper. (*n*)

Where an indictment contained three counts, each charging the sending of a different threatening letter, Byles, J., held that the prosecutor must elect on which count he would proceed, though any letter leading up to or explaining the letter on which the trial proceeded would be admissible. (*o*)

Prior and subsequent letters may be given in evidence.

The cases in the Chapter on Robbery may occasionally be referred to with advantage in cases falling within this Chapter. (*p*)

The Court will, after the bill is found, upon the application of the prisoner, order the letter to be deposited with an officer, in order that the prisoner's witnesses may inspect it. (*q*)

(*n*) *Rex v. Tucker*, R. & M. C. C. R. 134. We have seen that it has been held, on the trial of an indictment for threatening to accuse a person of an abominable crime, that the jury need not confine themselves to the consideration of the expressions used before the money was given, but may, if those expressions

are equivocal, connect with them what was afterwards said by the prisoner when taken into custody. *Reg. v. Kain*, 8 C. & P. 187, vol. 2, p. 110.

(*o*) *Reg. v. Ward*, 10 Cox, C. C. 42.

(*p*) Robinson's case, p. 239.

(*q*) *Rex v. Harris*, 6 C. & P. 105, Littledale, J., and Bolland, B.

## CHAPTER THE FIFTH.

## OF BIGAMY.

THE offence of having a plurality of wives at the same time is more correctly denominated *polygamy*: but, the name *bigamy* having been more frequently given to it in legal proceedings, it may perhaps be a means of more ready reference to treat of the offence under the latter title. (a) Originally this offence was considered of ecclesiastical cognizance only; and though the 4 Edw. 1, stat. 3, c. 5, treated it as a capital crime, it appears still to have been left of doubtful temporal cognizance, until the 1 Jac. 1, c. 11, declared that such offence should be felony.

The provisions of this statute were in several respects defective. A person whose consort had been abroad for seven years, though known to be living, might have married again with impunity. And so might a person who was only divorced *a mensâ et thoro*. The 9 Geo. 4, c. 31, therefore repealed the statute of James, and that Act is repealed by the 24 & 25 Vict. c. 95.

Present  
enactment.

Offence may be  
dealt with  
where offender  
shall be appre-  
hended.

Not to extend  
to second  
marriages, &c.,  
herein stated.

By the 24 & 25 Vict. c. 100, s. 57, 'Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, (b) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three (bb) years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, (c) and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place. Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall

(a) Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. According to the canonists, bigamy consisted in marrying two virgins successively one after the death of the other; or in once marrying a widow. 4 Blac. Com. 163. note (b). And see Bac. Abr. tit. *Bigamy*, in the notes.

(b) See 1 Hale, 692, 693; 1 East, P. C. c. 12, s. 2, p. 465; R. v. Topping, Dears. C. C. 647.

(bb) Not less than five years if the offence was committed after the 25th of July, 1864. See vol. 1, p. 73.

(c) As to principals in the second degree, accessories, and hard labour, &c., see vol. 1, pp. 178, 80, 81.

not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction.' (*d*)

The proviso in the new statute contains exceptions in respect of four cases, in which a second marriage is no felony within the statute.

The *first exception* is that the statute shall not extend 'to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty.'

The *second exception* is that it shall not extend to 'any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time.' (*dd*)

Where there has been such absence, the burden of proof is not upon the prisoner to shew that it was not known to him or her that the wife or husband was living within such time. On an indictment for bigamy, it was proved that the prisoner and his wife had lived apart for seven years, and that the prisoner then married again. There was no evidence of the prisoner's knowledge of the existence of his first wife at the time he married again. The prisoner was convicted. Held, that the burthen of proof that the prisoner did not know that his wife was alive at the time he contracted the second marriage was not on the prisoner, and that the conviction could not be sustained. (*e*)

There has been some doubt as to whether if the prisoner had at the time of the second marriage a reasonable and honest belief that his wife was dead (although she had not been absent for seven years) he could be convicted. It was ruled that he could not be convicted by Martin, B., (*f*) and by Cleasby, B. (*g*) But Brett, J., after consulting with Willes, J., decided that a *bona fide* belief that the wife was dead was no defence. (*h*)

The prisoner was convicted of bigamy. The first marriage was with Victor, in the year 1836. The second marriage was with Lumley, on the 9th of July, 1847. The prisoner lived with Victor till the middle of 1843, when they separated, and from that time no more had been heard of him. There was no evidence as to his age. The judge at the trial directed the jury that it was a presumption of law that Victor was alive at the time of the second marriage. Held, that there was no presumption of law that life continued for seven years, or for any other period after the time of

Exceptions :

1st. Second marriage out of England and Ireland by other than subjects of this realm.

2nd. Where husband or wife shall be absent for seven years, and not known to be living.

(*d*) This clause is taken from the 9 Geo. 4, c. 31, s. 22, and 10 Geo. 4, c. 34, s. 26 (1).

(*dd*) See 1 Hale, 693. 3 Inst. 83. 4 Blac. Com. 164. 1 East, P. C. c. 12, s. 3, p. 466. Reg. v. Cullen, 9 C. & P. 681; R. v. Jones, C. & M. 614; R. v. Briggs, Dears. & B. C. C. 98; 26 L. J. M. C. 7.

(*e*) R. v. Curgurwen, 35 L. J. M. C. 58; L. R. 1 C. C. R. See R. v. Heston, 3 F. & F. 819.

(*f*) R. v. Turner, 9 Cox, C. C. 145.

(*g*) R. v. Horton, 11 Cox, C. C. 670.

(*h*) R. v. Gibbons, 12 Cox, C. C. 237. See R. v. Cross, 1 F. & F. 510; R. v. Jones, 11 Cox, C. C. 558. The rulings of Martin, B., and Cleasby, B., are in accordance with the principle that *actus non facit reum nisi mens sit rea*. See R. v. Prince, vol. 1, p. 88. Mr. J. Brett's judgment there seems not reconcilable with his decision in R. v. Gibbons.

the latest proof of the life of the party, and that it was a question of fact for the jury, under the circumstances of each case, whether a person be alive or dead at any time within the interval of seven years, at the termination of which the protection afforded by statute in cases of bigamy comes into operation, and the conviction was quashed. (*i*)

If a man marries again after his wife has been absent for seven years and shall not have been known by him to be living within that time, during her life, the second marriage is null and void. (*j*)

3rd. Divorce,  
*a vinculo*  
*matrimonii*.

The *third exception* provides that the Act shall not extend 'to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage.' A divorce, therefore, *a mensâ et thoro*, which was held sufficient under the 1 Jac. 1, (*k*) is now no longer an exception. Nor would a judicial separation under the 20 & 21 Vict. c. 85, s. 16, suffice, for it is to have the effect of a divorce *a mensâ et thoro*. (*l*) It was held under the 1 Jac. 1, that if there be a divorce *a vinculo matrimonii*, and an appeal by one of the parties, though this suspends the sentence, and may possibly repeal it, yet a marriage pending that appeal will be aided by the exception. (*m*) In a case upon the 1 Jac. 1, the question arose whether a divorce by the Commissary or Consistorial Court of Scotland would operate so as to excuse a person, who, having been married in England, had been divorced by that Court, and had then married again in England, from the penalties of bigamy. And, from the decision of the judges, it appears, that, if the first marriage has taken place in England, it will not be a defence to prove a divorce *a vinculo matrimonii*

(*i*) R. v. Lumley, 38 L. J. M. C. 86, L. R. 1 C. C. R. 196, *et per cur.* In an indictment for bigamy it is incumbent on the prosecutor to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage, and that is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. The cases cited of *The King v. Twynning*, 2 M. & W. 894; *The King v. Harborne*, 2 A. & E. 540; and *Doe d. Nepean v. Knight*, 2 B. & A. 386; appear to us to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the Act *signifies* *into* *diver*

tion, and exonerates the prisoner from criminal culpability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The Legislature by this proviso sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition, viz. that when a party has been seen or heard of within seven years a presumption arises that he is still living. That we have said is always a question of fact. See *Murray v. The Queen*, 7 Q. B. 700; *R. v. Apley*, 1 Cox. C. C. 71.

(*j*) 4 B. C. Com. 164, note. (*z*).

(*k*) 1 Hale, 694. 3 Inst. 89. 1 Hawk. P. C. c. 42, s. 5. 4 Blac. Com. 164. *Middleton's case*, Old Bailey, 14 Car., 2 Kel. 27. And see 1 East, P. C. c. 12, s. 5, p. 467.

(*l*) See sec. 27 of the Act for the cases in which a marriage may be dissolved.

(*m*) 3 Inst. 89. 1 Hale, 694, citing Co. P. C. c. 27, p. 89, and stating further that if the sentence of divorce be repealed, a marriage afterwards is not aided by the exception, though there was once a divorce. A marriage within the time allowed for an appeal, under the 20 & 21 Vict. c. 85, s. 56, would be void. See *Chichester v. Mure*, 32 L. J. P. & M.

before the second marriage, if such divorce were out of England; unless the divorce were upon a ground, which, by the law of England, would warrant such a divorce: the divorces and sentences referred to in the third section of the 1 Jac. 1, being divorces and sentences of the ecclesiastical courts within the limits to which that statute applies. The prisoner was indicted for bigamy; both his marriages were in England; but before his second marriage his wife had obtained a divorce *a vinculo* from him in the Commissary Court of Scotland. It appeared that he took his wife into Scotland, that she might be induced to institute a suit against him there; and that he cohabited with a prostitute there, for the very purpose of irritating his wife, and furnishing ground for the divorce. A case being reserved and argued, the judges were unanimous, that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo* for grounds on which it was not liable to be dissolved *a vinculo* in England; and that no divorce of an ecclesiastical court was within the exception in the third section of the statute, unless it was the divorce of a court within the limits to which that statute extended. (n) The judges gave no opinion upon the husband's conduct, in drawing on his wife to sue for the divorce, because the jury had not found fraud. (o)

The fourth exception is that the Act shall not extend 'to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction.' It was resolved, upon the 1 Jac. 1, by all the judges, that a sentence of the spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage; the sentence having decided on the invalidity of the marriage only collaterally, and not directly. And further, admitting such sentence to be conclusive, yet that the counsel for the crown may avoid the effect of such sentence, by proving it to have been obtained by fraud or collusion. (p) There is no exception in the new Act where marriages are within the age of consent. (q)

4th. Marriage declared void by Court of competent jurisdiction.

With respect to the first marriage, the validity of it must be proved, and with respect to the second marriage, it must be shown that a form of marriage known to and recognized by the law as capable of producing a valid marriage has been gone through. (r)

Of the two marriages.

(n) It seems to admit of some doubt whether this case be any authority upon the present Act. The words of the 1 Jac. 1, c. 11, were 'divorced by any sentence in the Ecclesiastical Court.' The words in the 24 & 25 Vict. c. 100, s. 57, are, 'divorced from the bond of the first marriage.' These words are so much more general, that it may be contended that they except every case where according to the laws of the country where the divorce takes place, there is a legal divorce *a vinculo matrimonii*, and the words 'any court of competent jurisdiction' in the next clause, instead of the words 'the Ecclesiastical Court,' in the 1 Jac. 1, c. 11, seem to favour this view of the exception. C. S. G.

(o) Rex v. Lolley, MS. Bayley, J., and R. & R. 237. This case is referred to by the Lord Chancellor, and also by Mr. Brougham, in Tovey v. Lindsay, 1 Dow's Rep. 117. And see 5 Ev. Coll. Stat. 348, note (4). Upon the important subject of the dissolution of marriages, celebrated under the English law, by the Consistorial Court of Scotland, see a publication of Reports of some Decisions of that Court, by James Fergusson, Esq., Advocate, one of the Judges.

(p) Duchess of Kingston's case, Dom. Proc. 16 Geo. 3. 11 St. Tri. 262. 1 Leach, 146. 1 Hawk. P. C. c. 42, s. 11.

(q) See Rex v. Birmingham, 8 B. & C.

(r) R. v. Allen, post, p. 268.

What constitutes validity in the one case and a lawful form of marriage in the other, has been the subject of a great number of statutes and decisions, which will be found in the following pages, but it is proposed to consider in the first place the above important distinction with respect to the two marriages. The words of the statute are, 'whosoever being married shall marry any other person,' and it was thought that the same word being used with respect to both marriages, if the first must be a valid marriage, the second must also (but for the fact of the first marriage) be a valid marriage. (s) But it has now been decided that the words should be read as though they were, 'whosoever being married shall go through the form and ceremony of marriage,' and that the form and ceremony gone through must be such a one as is known to and recognized by the law as capable of producing a valid marriage, and that such a circumstance as that the parties are within the forbidden degree of consanguinity will not prevent the marriage from being bigamous. Where a married woman married her deceased sister's husband, (t) it was held that although such second marriage was void under the 5 & 6 Will. 4, c. 52, s. 2, yet she had committed the crime of bigamy. (u) A Protestant went through the form of marriage by a Romish priest with a Roman Catholic. This marriage was void under the 19 Geo. 2, c. 13, and it was held by the Court of Criminal Appeal in Ireland that such marriage being void could not be bigamous, although the first wife was alive. (v) But this decision was overruled in the following case. The prisoner's first wife being dead, he married again, and subsequently went through the form of marriage with his first wife's niece. The marriage was held to be void, but it was also held that the prisoner was rightly convicted of bigamy. (w)

Where in order to establish a charge of bigamy in a divorce suit it was proved that the husband married a woman in Australia according to the forms of the Kirk of Scotland, but there was no proof that such forms were recognized as legal by the laws of the colony, it was held that the bigamy was not established. (x)

Principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact are liable to be imprisoned

Principals in the second degree and accessories.

(s) R. v. Fanning, 10 Cox, C. C. 411.

(t) Cited *infra*.

(u) Reg. v. Brown, 1 C. & K. 144, per Lord Denman, C. J.

(v) R. v. Fanning, 5 Car. & P. 412.

(w) R. v. Allen, L. R. 1 C. C. R. 367; 41 L. J. M. C. 97, *et per cur.* In thus holding, it is not at all necessary to say that forms of marriage unknown to the law, as was the case in *Burt v. Burt*, would suffice to bring a case within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorised person, or in an unauthorised place, would be a "marrying" within the meaning of the 57th section of the 24 & 25 Vict. It will be enough to deal

with a case of this description when it arises. It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances, which independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case.

(x) *Burt v. Burt*, 29 L. J. P. & M. 133, and this decision was upheld in *R. v. Allen*, *supra*.

for any term not exceeding two years, with or without hard labour. (y)

Where an indictment charged a woman with bigamy, and the man, with whom she contracted the second marriage, with inciting and counselling the woman to commit the offence of bigamy, it was held that if the man knew at the time of the marriage that she was a married woman, and her husband alive, he might be convicted of counselling her to commit the crime of bigamy. (z)

Accessory  
before the  
fact.

The indictment in the preceding case did not contain any count charging the man as principal in the second degree; but there is no doubt, where a man marries a woman, knowing such woman to have a husband alive at the time of such marriage, that he is a principal in the second degree, as he is present and aids and assists the woman in committing the felony. (a)

Principal in  
the second  
degree.

The 24 & 25 Vict. c. 100, s. 57, provides that the offender may be tried in the county where he shall be 'apprehended (b) or be in custody.' But the provision of the statute is only cumulative, and the party may be indicted where the second marriage was, though he be never apprehended, and so may be outlawed; for in general where a statute creating a new felony directs that the offender may be tried in the county in which he is apprehended, but contains no negative words, he may be tried in that county in which the offence was committed. (c)

Trial in the  
county where  
the party is  
apprehended,  
or in custody.

Where the indictment is preferred in a county not where the second marriage was, but where the prisoner was apprehended or in custody, it need not state that fact; for it will appear by the caption that he was in custody of the sheriff of the county in which the indictment was found. (d)

A first marriage *de facto*, subsisting in fact at the time of the second marriage, was sufficient to bring a case within the 1 Jac. 1, though such first marriage were voidable by reason of consanguinity, affinity, or the like; for it was a marriage in judgment of law until it was avoided. (e) And now by the 5 & 6 Will. 4, c. 54, s. 1, all marriages, celebrated before the 31st of August, 1835, between persons being within the prohibited degrees of *affinity*, shall not be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit depending on the 31st of August, 1835, provided that nothing hereinbefore contained shall affect marriages between persons being within the

Of the first  
marriage.

(y) 24 & 25 Vict. c. 100, s. 67. See vol. 1, p. 178.

(z) Reg. v. Brawn, 1 C. & K. 144. Lord Denman, C. J.

(a) The Editor knows such to have been the opinion of Lord Denman, C. J., and Alderson, B., in Reg. v. Brawn. C. S. G.

(b) R. v. Gordon, R. & R. 48. Lord Digby's case, Hutt, 131.

(c) 1 Hale, 694. 3 Inst. 87. Starkie, 11.

(d) Reg. v. Whiley, rightly reported 1 C. & K. 150; erroneously reported 2 M. C. C. R. 186. Reg. v. Smythies, 1 Den. C. C. R. 498; 2 C. & K. 378. Rex v. Fraser, R. & M. C. C. R. 407, the

first marriage was laid in Kent, the second in Surrey, the venue was Middlesex, and it was alleged that the prisoner was apprehended without stating any place, and the conviction held bad, but no suggestion was made that the defect was cured by the caption; this case, therefore, may now be considered no authority. See Reg. v. O'Connor, 5 Q. B. 34. See Rex v. Treharne, R. & M. C. C. R. 298. Where an indictment for bigamy alleged that the prisoner was apprehended in Gloucestershire, and this was not proved; Channel, B., allowed the indictment to be amended by stating that he was in custody in that county. Rex v. Smith, 1 F. & F. 36. (e) 3 Inst. 88.

prohibited degrees of *consanguinity*; and by sec. 2, 'all marriages celebrated after the said 31st of August, between persons within the prohibited degrees of *consanguinity* or *affinity* shall be absolutely null and void to all intents and purposes whatsoever.' Where, therefore, a marriage now takes place within the prohibited degrees of consanguinity or affinity, as such marriage is wholly void, a second marriage will not amount to the crime of bigamy. Where, therefore, on an indictment for bigamy, it appeared that the prisoner had married two sisters, one after the death of the other, and the latter marriage was alleged in the indictment as the legal marriage, it was held that he was entitled to be acquitted, as that marriage was null and void to all intents and purposes. (*f*) This statute extends to the illegitimate as well as the legitimate child of a late wife's parents. Therefore a marriage with the illegitimate sister of a deceased wife is void. (*g*) So a marriage of a man with the daughter of the illegitimate half-sister of his deceased wife is void. (*h*) And the Act extends to the marriages of British subjects abroad. Where, therefore, Mr. Brook was duly married, according to the laws of Denmark, near Altona in Denmark, to the lawful sister of his deceased wife, and he and his second wife were then domiciled in England, and had merely gone over to Denmark on a temporary visit; it was held that this marriage, though valid in Denmark, was absolutely void in England. (*i*) But it has been ruled that though a lawful canonical marriage need not be proved, yet a marriage in fact (whether regular or not) must be shown; (*j*) which it seems must be understood where there is *prima facie* evidence of a lawful marriage. (*k*) Where the first marriage, which was with a Roman Catholic woman, was by a Romish priest in England, not according to the ritual of the Church of England, and the ceremony was performed in Latin, which the witnesses did not understand, and could not therefore swear that the ceremony of marriage according to the Church of Rome was read; it was directed that the defendant should be acquitted. (*l*) Willes, C. J., who tried him, seemed to be of opinion that a marriage by a priest of the Church of Rome was a good marriage, (*m*) if the ceremony according to that church could be proved; namely, the words of the contracting part of it.

Former Marriage Acts.

The former *Marriage Act*, 26 Geo. 2, c. 33, required all marriages to be by banns or license: and declared that all marriages solemnized in any other place than a church or public chapel (un-

(*f*) Reg. v. Chadwick, 11 Q. B. 173.

(*g*) Reg. v. St. Giles in the Fields, 11 Q. B. 173. Where a woman proved that she had a sister seven years older than herself, and that they were brought up together with their parents, and that she always believed that they were sisters, Erle, J., held this was sufficient evidence to prove that they were sisters. And the witness having also proved that her sister married M. in 1846 and died in 1848, and that the witness married M. in 1849, Erle, J., held that this showed the latter marriage to be void. Reg. v. Young, 5 Cox, C. C. 296.

(*h*) Reg. v. Brightwell, 1 Best & S. 447.

(*i*) Brook v. Brook, 3 Smale & G. 481. 9 H. L. C. 193. Such affinity can only be constituted by marriage, and not by sexual intercourse. Wing v. Taylor. 2 Swabey & T. 278.

(*j*) By Denison, J., referred to by the Court in Morris v. Miller, 1 Blac. R. 632.

(*k*) Rex v. Brampton, 10 East, 287, note (*b*).

(*l*) Lyon's case, Old Bailey, 1738. 1 East, P. C. c. 12, s. 10, p. 469, citing Serjeant Foster's MS.

(*m*) To this Mr. East (id. ibid.) subjoins a *quære*, and says that it must at least be understood of the marriage of persons of that communion.



less by special license), or solemnized without publication of banns or license, should be null and void to all intents and purposes. It contained also special provisions as to the publication of *banns*; and, as to marriages by *license*, it provided that all such marriages, where either of the parties, not being a widower or widow, was under the age of twenty-one years, had without the consent of the father of such of the parties so under age (if then living) first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there was no such guardian or guardians, then of the mother (if living and unmarried); or if there was no mother living and unmarried, then of a guardian or guardians of the person appointed by the Court of Chancery: should be absolutely null and void to all intents and purposes whatsoever. (n) But these provisions as to marriages by license were repealed as to any marriages thereafter to be solemnized by the 3 Geo. 4, c. 75, s. 1, which passed on the 22nd of July, 1822, and came into operation on the 1st of September following: and it was further enacted, that in all cases of marriage solemnized by license before the passing of this Act of 3 Geo. 4, without any such consent, and where the parties had continued to live together as husband and wife till the death of one of them, or till the passing of the Act, or had only discontinued their cohabitation for the purpose, or during the pending of any proceedings touching the validity of such marriage, such marriage, if not otherwise invalid, should be deemed good and valid to all intents and purposes. (o)

A pauper, not being a widow, and being under age, was married by license in 1808, without the consent of her father, who was then living, and continued to live with her husband till 1825, when she married another man, her first husband being still alive;

(n) Sec. 11. By sec. 12 provision was made for a petition to the Lord Chancellor, &c., where the guardians or mother were not in a situation to consent, or to refuse to consent. By sec. 4 licenses were to be granted to solemnize matrimony in the church or chapel of such parish only where one of the parties had resided for four weeks before. But by sec. 10 proof of the actual dwelling in the parishes, &c., where a marriage was by banns, or of the usual place of abode of one of the parties, where a marriage was by license, was made unnecessary after the solemnization of the marriage, and evidence was not to be received in either of these cases to prove the contrary, in any suit touching the validity of the marriage.

(o) 3 Geo. 4, c. 75, s. 2. Sec. 3 provided that the Act should not render valid any marriage declared invalid by any Court of competent jurisdiction before the passing of the Act; nor any marriage where either party should at any time afterwards, during the life of the other party, have lawfully intermarried with any other person. Nor (by sec. 4) any marriage, the invalidity of which had been established before the passing of the Act, upon the trial of any issue touching its validity, or touching the legitimacy of

any person alleged to be the descendant of the parties to such marriage. Nor (by sec. 5) any marriage the validity of which, or the legitimacy of any person alleged to be the lawful descendant of the parties married, had been duly brought into question in proceedings in any cause, &c., in which judgments or decrees, or orders of court, had been pronounced or made before the passing of the Act, in consequence of or from the effects of proof in such causes, &c., of the validity of such marriage, or the illegitimacy of such descendant. By sec. 6, if before the Act, any property had been possessed, or any title of honour enjoyed on the ground of the invalidity of any marriage, by reason that it was solemnized without consent, then, although no sentence had been pronounced against the validity of such marriage, the right and interest in such property or title of honour should in no manner be affected or prejudiced. And by sec. 7 nothing in the Act was to affect any act done before the passing of the Act, under the authority of any court, or in the administration of any personal estate or effects, or the execution of any will or testament, or the performance of any

it was held that the first marriage was rendered valid by 3 Geo. 4, c. 75, s. 2, because the parties had lived together till that Act passed, and was not rendered invalid by the pauper's subsequent marriage to another person. (p) But where two minors were married by license and without consent of parents, in 1816; and, after cohabiting for a few months, the owner of the house where they lodged compelled the husband to leave it for his misconduct, and he never lived with his wife afterwards, and died in 1817; and shortly after the separation he on several occasions had declared that he would never live with her again, giving as one reason that she was not his lawful wife; but some evidence was given that after the separation she had received small sums which were ultimately allowed out of the rent of the husband's land, but whether by his direction or not did not appear; it was held that the marriage was not rendered valid by the 3 Geo. 4, c. 75, s. 2. (q)

A prisoner was married on the 30th of August, 1822, by license, and without the consent of either of her parents, she being between sixteen and seventeen years of age; it was held, on a case reserved, that the marriage was valid, for under the 3 Geo. 4, c. 75, which passed on the 22nd of July, 1822, the 26 Geo. 2, c. 33, s. 11, had ceased to operate, and the provisions as to marriages by licenses in the 3 Geo. 4, c. 75, did not come into force till the first of September following. (r)

The 3 Geo. 4, c. 75, contained also enactments as to the granting of licenses, the consent of parents and guardians, and the publication of banns, which have been repealed by the 4 Geo. 4, c. 17, which enacted, that licenses should and might be granted by the same persons, and in the same manner and form, and, in the case of minors, with the same consent, and banns be published in the same manner and form as licenses and banns were respectively regulated by the 26 Geo. 2, c. 33; and enacted also (by sec. 2) that all marriages which had been or should be solemnized under licenses granted, or banns published, conformably to the provisions of the 3 Geo. 4, c. 75, should be good and valid; and that no marriage solemnized under any license granted in the form or manner prescribed by either the 26 Geo. 2, c. 33, or the 3 Geo. 4, c. 75, should be deemed invalid on account of want of consent of any parent or guardian. The old Marriage Act was then in a great measure revived, though only for a short period. The 4 Geo. 4, c. 5, was passed to render valid certain marriages which had been solemnized by licenses granted through error, after the passing of the 3 Geo. 4, c. 75, by or in the name of bodies corporate or persons their officers or surrogates, other than the Archbishops of Canterbury and York, and the bishops within their respective dioceses, who were alone authorised to grant such licenses by the 3 Geo. 4, c. 75; but this provision of the 4 Geo. 4, c. 5, applies only to marriages solemnized by such erroneous licenses granted after the 3 Geo. 4, and before the passing of the 4 Geo. 4, c. 5.

The 4 Geo. 4, c. 76, (s) reciting that it is expedient to amend the laws respecting marriages in England, enacts, that, after the 1st day of November, 1823, so much of the 26 Geo. 2, c. 33, as was

4 Geo. 4,  
c. 76, s. 1,  
repeals  
26 Geo. 2,

(p) *Rex v. St. John Delpike*. 2 B. & d. 226.

(q) *Poole v. Poole*, 2 Tyrw. R. 76.

(r) *Rex v. Waully*, R. & M. C. C. R.

(s) See 36 & 37 Vict. c. 91.

in force immediately before the passing of this Act, and also the 4 Geo. 4, c. 17, shall be repealed, save and except as to any acts, matters, or things, done under the provisions of either of the said Acts, before the said 1st day of November, as to which the said Acts are respectively to be of the same force and effect, as if this Act had not been made.

Sec. 2. 'After the 1st day of November (1823), all banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry, wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon three *Sundays* preceding the solemnization of marriage, during the time of morning service, or of evening service (if there shall be no morning service in such church or chapel upon the *Sunday* upon which such banns shall be so published), immediately after the second lesson; and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church, or in such chapel as aforesaid, belonging to such parish or chapelry wherein each of the said persons shall dwell; and that all other the rules prescribed by the said rubric concerning the publication of banns, and the solemnization of matrimony, and not hereby altered, shall be duly observed; and that in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns shall have been published, and in no other places whatsoever.'

c. 33, and  
4 Geo. 4, c. 17.

Banns where,  
when, and how  
published, and  
marriage to be  
solemnized  
where banns  
published.

Sec. 3. 'The bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel, having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize, by writing under his hand and seal, the publication of banns and the solemnization of marriages in such chapel for persons residing within such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese.'

Bishop, with  
consent of the  
patron and  
incumbent,  
may authorize  
the publication  
of banns in any  
public chapel.

Sec. 4. 'In every chapel in respect of which such authority shall be given as aforesaid, there shall be placed in some conspicuous part of the interior of such chapel a notice in the words following: "Banns may be published, and marriages solemnized in this chapel."'

Notice to be  
placed in such  
chapel.

Sec. 5. 'All provisions now in force, or which may hereafter be established by law, relative to providing and keeping marriage registers in any parish churches, shall extend and be construed to extend to any chapel in which the publication of banns and solemnization of marriages shall be so authorized as aforesaid, in the same manner as if the same were a parish church; and everything required by law to be done relative thereto by the churchwardens of any parish church, shall be done by the chapelwarden, or other officer exercising analogous duties in such chapel. (t)

Provisions  
relative to  
marriage regis-  
ters extended  
to chapels so  
authorized as  
aforesaid.

Sec. 6. 'On or before the said 1st day of November, and from

Book to be

(t) See as to the registration of marriages, &c. 86, ss. 1, 30, 31.

provided for  
the registration  
of banns.

time to time afterwards as there shall be occasion, the churchwardens and chapelwardens of churches and chapels, wherein marriages are solemnized, shall provide a proper book of substantial paper, marked and ruled respectively in manner directed for the register book of marriages; and the banns shall be published from the said register book of banns by the officiating minister, and not from loose papers, and after publication shall be signed by the officiating minister, or by some person under his direction.'

Notice of  
names, and  
place and time  
of abode of  
parties to be  
given to the  
minister.

Sec. 7. 'No parson, vicar, minister, or curate, shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns respectively, deliver, or cause to be delivered to such parson, vicar, minister, or curate, a notice in writing, dated on the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged, in such house or houses respectively.'

How far  
ministers not  
punishable for  
marrying  
minors without  
consent. In  
what case pub-  
lication of  
banns void.

Sec. 8. 'No parson, minister, vicar, or curate, solemnizing marriages after the first day of November next, between persons, both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriages without consent of parents or guardians, unless such parson, minister, vicar, or curate, shall have notice of the dissent of such parents or guardians; and in case such parents or guardians, or one of them, shall openly and publicly declare or cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication, his, her, or their dissent to such marriage, such publication of banns shall be absolutely void.'

In what case  
republication  
of banns  
necessary.

Sec. 9. 'Wherever a marriage shall not be had within three months after the complete publication of banns, no minister shall proceed to the solemnization of the same, until the banns shall have been republished on three several *Sundays*, in the form and manner prescribed in this Act, unless by license duly obtained according to the provisions of this Act.

Licenses to  
marry in  
church, &c., of  
parish wherein  
one party re-  
sided for 15  
days before.

Sec. 10. 'No license of marriage shall, from and after the said first day of November, be granted by any archbishop, bishop, or other ordinary, or person having authority to grant such licenses, to solemnize any marriage in any other church or chapel than in the parish church, or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such license.'

Where caveat  
entered, no  
license to  
issue till mat-  
ter examined  
by judge.

Sec. 11. 'If any caveat be entered against the grant of any license for a marriage, such caveat being duly signed by or on the behalf of the person who enters the same, together with his place of residence, and the ground of objection on which his caveat is founded, no license shall issue till the said caveat, or a true copy thereof, be transmitted to the judge out of whose office the license is to issue, and until the judge has certified to the registrar that he has examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the license for the said mar-

riage, or until the caveat be withdrawn by the party who entered the same.'

Sec. 12. 'All parishes where there shall be no parish church or chapel belonging thereto, or none wherein divine service shall be usually solemnized every Sunday, and all extra-parochial places whatever, having no public chapel wherein banns may be lawfully published, shall be deemed and taken to belong to any parish or chapelry next adjoining, for the purposes of this Act only; and where banns shall be published in any church or chapel of any parish or chapelry adjoining to any such parish or chapelry where there shall be no church or chapel, or none wherein divine service shall be solemnized as aforesaid, or to any extra-parochial place as aforesaid, the parson, vicar, minister, or curate, publishing such banns, shall, in writing under his hand, certify the publication thereof in the same manner as if either of the persons to be married had dwelt in such adjoining parish or chapelry.'

Parishes, where no church or chapel, and extra-parochial places, deemed to belong to any adjoining parish, &c.

Sec. 13. 'If the church of any parish, or chapel of any chapelry, wherein marriages have been usually solemnized, be demolished in order to be rebuilt, or be under repair, and on such account be disused for public service, it shall be lawful for the banns to be proclaimed in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, or in any place within the limits of the parish or chapelry which shall be licensed by the bishop of the diocese for the performance of divine service, during the repair or rebuilding of the church as aforesaid; and where no such place shall be so licensed, then, during such period as aforesaid, the marriage may be solemnized in the adjoining church or chapel wherein the banns have been proclaimed, and all marriages heretofore solemnized in other places within the said parishes or chapelries than the said churches or chapels, on account of their being under repair, or taken down in order to be rebuilt, shall not be liable to have their validity questioned on that account, nor shall the ministers who have so solemnized the same be liable to any ecclesiastical censure, or to any other proceeding or penalty whatsoever.' This enactment being defective in not providing that marriages might be solemnized in the places licensed for the proclamation of banns; nor that marriages might be solemnized by license in an adjoining church or chapel; nor that the validity of marriages *thereafter* solemnized in other places than the churches and chapels out of repair, should not be questioned on that account; nor that the ministers who should *thereafter* solemnize such marriages should not be liable to ecclesiastical censure, &c.; the 5 Geo. 4, c. 32, enacts, that 'all marriages which have been heretofore solemnized, or which shall be hereafter solemnized in any place within the limits of such parish or chapelry so licensed for the performance of divine service, during the repair or rebuilding of the church of any parish, or chapel of any chapelry, wherein marriages have been usually solemnized; or if no such place shall be so licensed, then in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, whether by banns lawfully published in such church or chapel, or by license lawfully granted, shall not have their validity questioned on account of their having been so solemnized, nor shall the ministers who have so solemnized the same be liable to an ecclesiastical censure, or to

Where churches are demolished, or under repair, banns to be proclaimed in a church or chapel of an adjoining parish, &c.

Provision for former marriages so solemnized.

any other proceeding.' And that all licenses granted by any person having authority to grant them for the solemnization of marriages in a church or chapel, wherein marriages have been usually solemnized, shall be deemed to be licenses for the solemnization of marriages in any place within the limits of such parish or chapelry, which shall be licensed by the bishop for the performance of divine service, during the repair or rebuilding of any such church or chapel, or if no place shall be so licensed, then in the church or chapel of any adjoining parish or chapelry wherein marriages have been usually solemnized. (*u*) And also that all banns proclaimed, and all marriages solemnized, according to the provisions of this Act in any place so licensed, within the limits of any parish or chapelry, during the repair or rebuilding of the church, &c., shall be considered as proclaimed and solemnized in the church, &c., and shall be so registered accordingly. (*v*)

Oath to be taken before the surrogate as to certain particulars before license is granted.

The 4 Geo. 4, c. 76, s. 14, enacts, 'for avoiding all fraud and collusion in obtaining of licenses for marriage, that before any such license be granted, one of the parties shall personally swear before the surrogate, or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony according to the tenor of the said license; and that one of the said parties hath, for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this Act has been obtained thereto: provided always, that if there should be no such person or persons having authority to give such consent, then upon oath made to that effect by the party requiring such license, it shall be lawful to grant such license, notwithstanding the want of any such consent.'

Bond not to be required before granting license.

Sec. 15. 'It shall not be required of any person applying for such license to give any caution or security, by bond or otherwise, before such license is granted, anything in any Act or canon to the contrary thereof notwithstanding.'

Who are to give consent, if parties are under age.

Sec. 16. 'The father, if living, of any party under twenty-one years of age, such parties not being a widower or widow; or, if the father shall be dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and, in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and, if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent.' (*w*)

(*u*) Sec. 2.

tical churches and chapels.

(*v*) Sec. 3. Many other acts have passed to render valid marriages in par-

(*w*) This section is merely directory, see *Rex v. Birmingham*, *post*, p. 299.

Sec. 17. 'In case the father or fathers of the parties to be married, or of one of them, so under age as aforesaid, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them, whose consent is made necessary as aforesaid to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably, or from undue motives, refuse, or withhold his, her, or their consent, to a proper marriage, then it shall and may be lawful for any person desirous of marrying, in any of the before-mentioned cases, to apply by petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of Great Britain for the time being, Master of the Rolls, or Vice-Chancellor of England, who is and are respectively hereby empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall upon examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the time being, Master of the Rolls, or Vice-Chancellor, shall judicially declare the same to be so; and such judicial declaration shall be deemed and taken to be as good and effectual, to all intents and purposes, as if the father, guardian or guardians, or mother of the person so petitioning, had consented to such marriage.'

If the father of minor be *non compos mentis*, or if guardian or mother of minor be *non compos mentis*, or beyond sea, &c., parties may apply to the Lord Chancellor.

Sec. 18. 'From and after the said first day of November, no surrogate, hereafter to be deputed by any ecclesiastical judge who hath power to grant licenses, shall grant any such license until he hath taken an oath before the said judge, or before a commissioner appointed by commission under the seal of the said judge, which commission the said judge is hereby authorized to issue, faithfully to execute his office according to law, to the best of his knowledge, and hath given security by his bond in the sum of one hundred pounds to the bishop of the diocese for the due and faithful execution of his said office.'

Surrogate to take oath of office.

Sec. 19. 'Whenever a marriage shall not be had within three months after the grant of a license by any archbishop, bishop, or any ordinary or person having authority to grant such license, no minister shall proceed to the solemnization of such marriage until a new license shall have been obtained, unless by banns duly published according to the provisions of this Act.'

In what case new license to be obtained.

Sec. 20. 'Nothing hereinbefore contained shall be construed to extend to deprive the Archbishop of Canterbury and his successors, and his and their proper officers, of the right which hath hitherto been used, in virtue of a certain statute made in the twenty-fifth year of the reign of the late King Henry the Eighth, intituled, "An Act concerning Peter-pence and Dispensations," of granting special licenses to marry at any convenient time or place.' (x)

Right of Archbishop of Canterbury to grant special licenses, as under 25 Hen. 8, c. 21.

Sec. 22. 'If any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special license as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or license from a person or persons having authority to grant the same first had and obtained, or shall know-

Marriage void where persons wilfully marry in any other place than a church, &c.

(x) By sec. 21, persons solemnizing marriage in any other place than a church or chapel, or without banns or license, or under pretence of being in holy orders,

shall be transported for fourteen years, the prosecution to be commenced within three years.

ingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.' (y)

Proof of actual residence of parties not necessary to validity of marriage, whether after banns or by license.

Sec. 26. 'After the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or, where the marriage is by license, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary, in any suit touching the validity of such marriage.' (z)

Sec. 28. 'All marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same; and immediately after the celebration an entry shall be made in the register.'

Proviso for the royal family.

Sec. 30. 'This Act, or anything therein contained, shall not extend to the marriages of any of the royal family.'

And for marriages of Quakers and Jews.

Sec. 31. 'Nothing in this Act contained shall extend to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion respectively.' (a)

After 1st of March, 1837, all rules prescribed by the rubric to be observed.

The 6 & 7 Will. 4, c. 85, (b) s. 1, enacts, that after the 1st of March, 1837, (c) 'notwithstanding anything in this Act contained, all the rules prescribed by the rubric concerning the solemnizing of marriages shall continue to be duly observed by every person in holy orders of the Church of England who shall solemnize any marriage in England: provided always, that where by any law or canon in force before the passing of this Act it is provided that any marriage may be solemnized after publication of banns, such marriage may be solemnized in like manner on production of the

Marriages may be solemnized on production of registrar's certificate.

(y) By sec. 23, where a marriage is solemnized between parties, one of whom is under age, and not a widower or widow, contrary to the provisions of the Act, by false oath or fraud, the guilty party shall forfeit all property accruing from the marriage.

(z) Upon an enactment nearly similar, it was determined, in a prosecution for bigamy, where the first marriage was proved to have been by banns, that it was no objection that the parties did not reside in the parish where the banns were published and the marriage was celebrated. The provision of the statute was considered as an express answer to the objection; and it appears not to have been adverted to when the point was reserved for the opinion of the judges. *Rex v. Hind*, R. & R. 253.

(a) See the next page. By sec. 33, the Act only extends to England. As to Ireland, see *post*, p. 308.

(b) By 37 & 38 Vict. c. 35 (passed 16th July, 1874), this Act is repealed in part

namely,

Section Four, the words "in the form of schedule (A.) to this Act annexed, or to the like effect."

Sections Six and Seven.

Section Eleven from "in the form of Schedule (C.)" to "on granting such license."

Section Twelve.

Section Fourteen from "and no marriage" to the end of that section.

Section Seventeen, the words "Subject to the approval of the Board of Guardians thereof."

Sections Twenty-five, Twenty-nine, Thirty-five and Thirty-eight.

Section Thirty-nine, the words "or if the marriage is by license, within Seven days after such entry."

Section Forty-three, Schedules (A.), (B.), and (C.)

(c) By 7 Will. 4, c. 1, the operation of this Act was suspended until after the last day of June 1837.



registrar's certificate as hereinafter provided ; (d) provided also, that nothing in this Act contained shall affect the right of the Archbishop of Canterbury and his successors, and his and their proper officers, to grant special licenses to marry at any convenient time and place, or the right of any surrogate or other person now having authority to grant licenses for marriages.'

Sec. 2. The Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnize marriage according to the usages of the said society and of the said persons respectively ; and every such marriage is hereby declared and confirmed good in law, provided that the parties to such marriage be both of the same society, or both persons professing the Jewish religion respectively, provided also, that notice to the registrar shall have been given, and the registrar's certificate shall have issued in manner hereinafter provided.' (e)

Marriages of  
Quakers and  
Jews.

(d) The 1 Vict. c. 22, s. 36, after reciting this provision, enacts, 'that the giving the notice to the superintendent registrar, and the issue of the superintendent registrar's certificate, as in the said Act and by this Act provided, shall be used and stand instead of the publication of banns to all intents and purposes where no such publication shall have taken place ; and every parson, vicar, minister, or curate in England shall solemnize marriage after such notice and certificate as aforesaid in like manner as after due publication of banns : provided always that the church wherein any marriage according to the rites of the Church of England shall so be solemnized shall be within the district of the superintendent registrar by whom such certificate as aforesaid shall have been issued.'

(e) The 23 & 24 Vict. c. 18, recites this clause, and sec. 12 of the 7 & 8 Vict. c. 81 (l.), and enacts that after the 30th of June, 1860, marriages may be contracted and solemnized according to the usages of the said Society of Friends, called Quakers, in England and Ireland respectively, not only in the case provided for by the said recited provisions, but also in cases where one only or where neither of the parties to the marriage shall be a member of the said society ; [provided that the party or parties who shall not be a member or members of the said society shall profess with or be of the persuasion of the said society ;] provided also that no person who is not a member of the said society shall be married according to the usages thereof, unless he or she shall be authorized thereto, under or in pursuance of some general rule or rules of the said society, in England and Ireland respectively ; and a copy of such general rule or rules purporting to be signed by the recording clerk for the time being of the said society in London and in Dublin respectively, shall be admitted as evidence of such general rule or rules in all proceedings touching the validity of any such marriage.' By sec. 2, all enactments in force relating to marriages according

to the usages of the said society are extended to every marriage contracted under this Act.

The part within brackets is repealed by the 37 & 38 Vict. c. 66, the Statute Law Revision Act, 1875.

By 35 Vict. c. 10, s. 1, 'From and after the 1st day of January, 1873, the said recited Act of the 23rd and 24th years of the reign of Her present Majesty, chapter 18, shall be construed and shall take effect as if the words next hereinafter specified were omitted therefrom, namely, "Provided always, that the party or parties who shall not be a member or members of the said society shall profess with or be of the persuasion of the said society." Provided that no marriage shall be valid under this Act, unless when notice of the intention to solemnize such marriage is given to the superintendent-registrar in England, or (as the case may be) to the registrar of marriages in Ireland, as required by law, a certificate shall be produced to such superintendent-registrar or registrar of marriages, purporting to be signed by some registering officer of the said Society of Friends in England or in Ireland respectively, to the effect that the party by whom or on whose behalf such notice is given, or each such party (as the case may be), is authorized thereto, under or in pursuance of some general rule or rules of the said society in England or Ireland respectively, and such certificate shall be for all purposes conclusive evidence that the party by whom or on whose behalf such notice is given, or each such party as the case may be, is duly authorized to proceed to the accomplishment of such marriage according to the usages of the said society, and the register of such marriage, or a copy thereof duly certified according to law, shall be conclusive evidence of the due production of such certificate as aforesaid, but no such certificate shall be required in cases where the party giving such notice shall declare, either orally or in writing, if thereunto required, that both the parties to the in-

Superintendent registrar of births to be superintendent registrar of marriages.

Notice of every intended marriage to be given to the superintendent registrar of the district.

Superintendent registrar to keep notices in a book.

Notices to be read at meetings of guardians.

Sec. 3. 'The superintendent registrar of births and deaths of every union, parish, or place shall be, in right of his office, superintendent registrar of marriages within such union, parish or place, and such union, parish, or place shall be deemed the district of such superintendent registrar of marriages.'

Sec. 4. 'In every case of marriage intended to be solemnized in England after the said first day of March, (*f*) according to the rites of the Church of England (unless by license or by special license, or after publication of banns), and in every case of marriage intended to be solemnized in England after the said first day of March, according to the usages of the Quakers or Jews, or according to any form authorized by this Act, one of the parties shall give notice under his or her hand in the form of schedule (A.) to this Act annexed, or to the like effect, (*ff*) to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days then next preceding, or if the parties dwell in the districts of different superintendent registrars shall give the like notice to the superintendent registrar of each district, and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, and the time not being less than seven days during which each has dwelt therein, and the church or other building in which the marriage is to be solemnized; provided that if either party shall have dwelt in the place stated in the notice during more than one calendar month, it may be stated therein that he or she hath dwelt there one month and upwards.' (*g*)

Sec. 5. 'The superintendent registrar shall file all such notices, and keep them with the records of his office, and shall also forthwith enter a true copy of all such notices fairly into a book, to be for that purpose furnished to him by the registrar-general, to be called "the marriage notice book," the cost of providing which shall be defrayed in like manner as the cost of providing register books of births and deaths; (*gg*) and the marriage notice book shall be open at all reasonable times without fee to all persons desirous of inspecting the same; and for every such entry the superintendent registrar shall be entitled to have a fee of one shilling.'

Sec. 6. 'If such superintendent registrar shall be clerk to the guardians of any poor-law union, or of any parish or place comprising the district for which such superintendent registrar shall act, he shall read such notices as hereinafter directed; and if he shall not be such clerk, then he shall transmit to such clerk on the day previous to each weekly meeting of such guardians all such

tended marriage are either members of the said society or in profession with or of the persuasion thereof.

All marriages solemnized in England before July 1, 1837, and in Ireland before April 1, 1845, according to the usages of the Quakers or Jews, are rendered valid by the 10 & 11 Vict. c. 58, provided the parties were both Quakers or both persons professing the Jewish religion. As to marriages of Jews in Ireland, see 7 & 8 Vict. c. 81, s. 13, 34, & 35. Vict. c. 49

s. 28. See 19 & 20 Vict. c. 119, s. 21, *post*, p. 293.

(*f*) See note to sec. 1, *ante*, p. 278.

(*ff*) See *ante*, p. 278, note (*b*).

(*g*) By 1 Vict. c. 22, s. 10, the registrar-general may unite two or more districts, and by sec. 11 may divide districts. See the 19 & 20 Vict. c. 119, s. 3, *post*, p. 289.

(*gg*) Repealed as to the costs of registers by the 21 & 22 Vict. c. 25, s. 6.

notices of intended marriage as he shall have received on or since the day previous to the weekly meeting immediately preceding the same; and such clerk shall read such notices immediately after the minutes of the proceedings of such guardians at their last meeting shall have been read; and such notices shall be so read three several times in three successive weeks at the weekly meetings of such guardians, unless in any case license for marriage shall be sooner granted, and notice of such license being granted shall have been given to such clerk; provided also, that if it shall happen that the board of guardians of any such union, parish, or place shall not so meet, it shall be sufficient for the purposes of this Act that such notices shall be read at any meeting of such guardians which shall be held within twenty-one days from the day of such notice being entered.' (*h*)

The 1 Vict. c. 22, s. 24, reciting this section, and that 'it may happen in certain superintendent registrars' districts that there may be no such guardians,' enacts, 'that in every such case, but only until the election of such board of guardians and of a clerk to their board, every notice of marriage given according to the provisions of the said Act for marriages, or a true and exact copy thereof, under the hand of the superintendent registrar, shall be suspended in some conspicuous place in the office of the superintendent registrar during seven successive days, if the marriage is to be solemnized by license, or twenty-one successive days if the marriage is to be solemnized without license, before any marriage shall be solemnized in pursuance of such notice; and the particulars of every such notice shall be sent by the superintendent registrar to every registrar of marriages within his district, and shall be open to the inspection of every one who shall apply at reasonable times to such registrar to inspect the same.' (*i*)

By the 6 & 7 Will. 4, c. 85, s. 7, (*j*) 'after the expiration of seven days if the marriage is to be solemnized by license, or of twenty-one days if the marriage is to be solemnized without license, after the entry of such notice, the superintendent registrar, upon being requested so to do by or on behalf of the party by whom the notice was given, shall issue under his hand a certificate in the form of schedule (B.) to this Act annexed, provided that no lawful impediment be shown to the satisfaction of the superintendent registrar why such certificate should not issue, and provided that the issue of such certificate shall not have been sooner forbidden in manner hereinafter mentioned by any person or persons authorized in that behalf as hereinafter is provided; and every such certificate shall state the particulars set forth in the notice, the day on which the notice was entered, and that the full period of seven days or of twenty-one days (as the case may be) has elapsed since the entry of such notice, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have a fee of one shilling.

Notices of marriage to be suspended in the superintendent registrar's office, instead of being read at the meetings of guardians, &c.

After seven days, or twenty-one days, certificate of notice to be given upon demand.

(*h*) This section is now repealed, see Act, 1874. See sec. 5 of 19 & 20 Vict. ante, p. 278, note (*b*). See the 19 & 20 c. 119, *post*, p. 290.

Vict. c. 119, s. 1, *post*, p. 288.

(*i*) This section is now repealed, see Act, 1874, s. 7, *ante*, p. 278, note (*b*).  
 Vict. c. 35, the Statute Law Revision

By sec. 8 the registrar-general is to furnish the superintendent registrars with forms of certificates, which are to be distinguished in certain ways where the marriage is by license, and where it is without license.

Issue of  
superintendent  
registrar's  
certificate may  
be forbidden.

Sec. 9. 'Any person authorized in that behalf may forbid the issue of the superintendent registrar's certificate by writing at any time before the issue of such certificate the word 'forbidden' opposite to the entry of the notice of such intended marriage in the marriage notice book, and by subscribing thereto his or her name and place of abode, and his or her character, in respect of either of the parties, by reason of which he or she is so authorized; and in case the issue of any such certificate shall have been so forbidden the notice and all proceedings thereupon shall be utterly void.'

Consent.

Sec. 10. 'After the said first day of March, (*k*) the like consent shall be required to any marriage in England solemnized by license as would have been required by law to marriages solemnized by license immediately before the passing of this Act; and every person whose consent to a marriage by license is required by law is hereby authorized to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by license or without license.'

Superintendent  
registrar may  
grant licenses  
for marriage.

Sec. 11. 'After the said first day of March (*k*) every superintendent registrar shall have authority to grant licenses for marriage in any building registered as hereinafter provided within any district under his superintendence, or in his office [in the form of schedule (C) to this Act annexed, and for every such license shall be entitled to have of the party requiring the same the sum of three pounds above the value of the stamps necessary on granting such license]; (*l*) and every superintendent registrar shall four times in every year, on such days as shall be appointed by the registrar-general, make a return to the registrar-general of every license granted by him since his last return, and of the particulars stated concerning the parties: provided always, that no superintendent registrar shall grant any such license until he shall have given security by his bond in the sum of one hundred pounds to the registrar-general for the due and faithful execution of his office: provided also, that nothing herein contained shall authorize any superintendent registrar to grant any license for marriage in any church or chapel in which marriages may be solemnized according to the rites of the Church of England, or in any church or chapel belonging to the Church of England or licensed for the celebration of Divine worship according to the rites and ceremonies of the Church of England, or any license for marriage in any registered building which shall not be within his district.'

Superintendent  
registrar to  
give security.

Proviso.

Certificate to  
be given before  
the license is  
granted.

Sec. 12. (*m*) 'Before any license for marriage shall be granted by any such superintendent registrar one of the parties intending marriage shall appear personally before such superintendent registrar, and in case the notice of such intended marriage shall not have been given to such superintendent registrar, shall deliver

(*k*) See note to sec. 1, *ante*, p. 278, is now repealed, see *ante*, p. 278, note (*b*).  
note (*b*). (*m*) This section is now repealed, see

(*l*) See the 19 & 20 Vict. c. 119, s. 10, *ante*, p. 278, note (*b*).  
*post*, p. 291. The part within brackets

to him the certificate of the superintendent registrar or superintendent registrars to whom such notice shall have been given, and such party shall make oath, or shall make his or her solemn affirmation or declaration instead of taking an oath, that he or she believeth that there is not any impediment of kindred or alliance or other lawful hindrance to the said marriage, and that one of the said parties hath for the space of fifteen days immediately before the day of the grant of such license had his or her usual place of abode within the district within which such marriage is to be solemnized, and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required by law has been obtained thereto, or that there is no person having authority to give such consent, as the case may be; and all such licenses and declarations shall be respectively liable to the same stamp duties as licenses for marriage granted by the ordinary of any diocese, and affidavits made in order to procure the same.

Sec. 13. 'Any person, on payment of five shillings, may enter a caveat with the superintendent registrar against the grant of a certificate or a license for the marriage of any person named therein; and if any caveat be entered with the superintendent registrar, such caveat being duly signed by or on behalf of the person who enters the same, together with his or her place of residence, and the ground of objection on which his or her caveat is founded, no certificate or license shall issue or be granted until the superintendent registrar shall have examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the certificate or license for the said marriage, or until the caveat be withdrawn by the party who entered the same; provided that in cases of doubt it shall be lawful for the superintendent registrar to refer the matter of any such caveat to the registrar general, who shall decide upon the same: provided likewise, that in case of the superintendent registrar refusing the grant of the certificate or license, the person applying for the same shall have a right to appeal to the registrar-general, who shall thereupon either confirm the refusal or direct the grant of the certificate or license.'

Caveat may be lodged with superintendent registrar against grant of license of certificate.

Sec. 14. 'After the said first day of March (*n*) no marriage after such notice as aforesaid, unless by virtue of a license to be granted by the superintendent registrar, shall be solemnized or registered in England until after the expiration of twenty-one days after the day of the entry of such notice as aforesaid; [and no marriage shall be solemnized by the license of any superintendent registrar or registered until after the expiration of seven days after the day of the entry of such notice as aforesaid.]' (*o*)

Marriages not to be solemnized until after twenty-one days after entry of notice, unless by license.

Sec. 15. 'Whenever a marriage shall not be had within three calendar months after the notice shall have been so entered by the superintendent registrar, the notice and certificate, and any license which may have been granted thereupon, and all other proceedings thereupon, shall be utterly void; and no person shall proceed to solemnize the marriage, nor shall any registrar register the

New notice required after three months.

(*n*) See note to sec. 1, *ante*, p. 278, note (b).

(*o*) The part within brackets is now repealed, see *ante*, p. 278, note (b).

same, until new notice shall have been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid.' (p)

Places of worship may be registered for solemnizing marriages therein.

Sec. 18. 'Any proprietor or trustee of a separate building, certified according to law as a place of religious worship, may apply to the superintendent registrar of the district, in order that such building may be registered for solemnizing marriages therein, and in such case shall deliver to the superintendent registrar a certificate, signed in duplicate by twenty householders at the least, that such building has been used by them during one year at the least as their usual place of public religious worship, and that they are desirous that such place should be registered as aforesaid, each of which certificates shall be countersigned by the proprietor or trustee by whom the same shall be delivered; and the superintendent registrar shall send both certificates to the registrar-general, who shall register such building accordingly in a book to be kept for that purpose at the general register office: and the registrar-general shall indorse on both certificates the date of the registry, and shall keep one certificate with the other records of the general register office, and shall return the other certificate to the superintendent registrar, who shall keep the same with the other records of his office; and the superintendent registrar shall enter the date of the registry of such building in a book to be furnished to him for that purpose by the registrar-general, and shall give a certificate of such registry under his hand, on parchment or vellum, to the proprietor or trustee by whom the certificates are countersigned, and shall give public notice of the registry thereof by advertisement in some newspaper circulating within the county, and in the "London Gazette." (q)

Marriages may be solemnized in such registered places, in the presence of some registrar and of two witnesses.

Sec. 20. 'After the expiration of the said period of twenty-one days, or of seven days if the marriage is by license, marriages may be solemnized in the registered building stated as aforesaid in the notice of such marriage, between and by the parties described in the notice and certificate, according to such form and ceremony as they may see fit to adopt: provided nevertheless, that every such marriage shall be solemnized with open doors, between the hours of eight and twelve in the forenoon, in the presence of some registrar of the district in which such registered building is situate, and of two or more credible witnesses: provided also, that in some part of the ceremony, and in the presence of such registrar and witnesses, each of the parties shall declare,

"I do solemnly declare, that I know not of any lawful impediment why I, *A. B.*, may not be joined in matrimony to *C. D.*"

And each of the parties shall say to the other,

"I call upon these persons here present to witness that I, *A. B.*, do take thee, *C. D.*, to be my lawful wedded wife [or husband]."

(p) By sec. 16, the superintendent registrar's certificate or license is to be delivered to the person by or before whom the marriage is solemnized.

(q) By sec. 19, on the removal of the same congregation to a new place of worship

ship may be immediately registered, instead of the one disused, and after such substitution it shall not be lawful to solemnise any marriage in such disused building.

Provided also, that there be no lawful impediment to the marriage of such parties.'

Sec. 21. 'Any persons who shall object to marry under the provisions of this Act in any such registered building may, after due notice and certificate issued as aforesaid, contract and solemnize marriage at the office and in the presence of the superintendent registrar and some registrar of the district, and in the presence of two witnesses, with open doors, and between the hours aforesaid, making the declaration and using the form of words hereinbefore provided in the case of marriage in any such registered building.' (r)

Marriages may be celebrated before the superintendent registrar.

Sec. 25. (s) 'After any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the actual dwelling of either of the parties previous to the marriage within the district wherein such marriage was solemnized for the time required by this Act, or of the consent of any person whose consent thereunto is required by law: nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage.'

Proof of residence of parties, or consent not necessary to establish the marriage.

Sec. 26. 'With the consent under the hand and seal of the patron and incumbent respectively of the church of the parish or district in which may be situated any public chapel with or without a chapelry thereunto annexed, or any chapel duly licensed for the celebration of divine service according to the rites and ceremonies of the Church of England, or any chapel the minister whereof is duly licensed to officiate therein according to the rites and ceremonies of the Church of England, or without such consent after two calendar months' notice in writing given by the registrar of the diocese to such patron and incumbent respectively, the bishop of the diocese may, if he shall think it necessary for the due accommodation and convenience of the inhabitants, authorize by a license under his hand and seal the solemnization of marriages in any such chapel for persons residing within a district the limits whereof shall be specified in the bishop's license, and under such provisions as to the amount, appropriation, or apportionment of the dues, and as to other particulars, as to the said bishop may seem fit, and as may be specified in the said license; provided that it shall be lawful for any patron or incumbent who shall refuse or withhold consent to the grant of any such license to deliver to the bishop under his or her hand and seal, a statement of the reasons for which such consent shall have been so refused or withholden; and no such license shall be granted by any bishop until he shall have inquired into the matter of such reasons; and every instrument of consent of the patron and incumbent, or, if such consent be refused or withholden, a copy of the notice under the hand of the registrar, and every statement of reasons alleged as aforesaid by the patron or incumbent, with the bishop's adjudication thereupon under his hand and seal, shall be registered in the registry of the diocese; and thenceforth and until the said license be revoked marriages solemnized

Bishops, with consent of patrons, may license chapels for the solemnization of marriages in populous places.

(r) Sec. 22 regulates the marriage fees of the registrar. By sec. 23, the registrar is to register all marriages solemnized before him in books to be sent by the registrar-general, and copies of the

register book are to be given quarterly to the superintendent registrar.

(s) This section is now repealed, see *ante*, p. 278, note (b).

in such chapel shall be as valid to all intents and purposes as if the same had been solemnized in the parish church, or in any chapel where marriages might heretofore have been legally solemnized.' (t)

Notice of such licenses to be affixed in chapels.

Sec. 29. (u) 'There shall be placed in some conspicuous part in the interior of every chapel in respect of which such license shall be given as aforesaid a notice in the words following: "Marriages may be solemnized in this chapel.'" (v)

Marriages performed in such chapels to be under the same regulations as those performed in parish churches.

Sec. 30. 'All provisions which shall from time to time be in force relative to marriages, and to providing, keeping, and transmitting register books and copies of registers of marriages solemnized in any parish church, shall extend to any chapel in which the solemnization of marriages shall be authorized as aforesaid, in the same manner as if the same were a parish church, and everything required by law to be done relating thereto by the rector, vicar, curate, or churchwardens respectively, of any parish church shall be done by the officiating minister, chapelwarden, or other person exercising analogous duties in such chapel respectively.'

Option to parties to be married at parish church.

Sec. 31. 'Notwithstanding any such license as aforesaid to solemnize marriages in any such chapel, the parties may, if they think fit, have their marriage solemnized in the parish church, or in any chapel in which heretofore the marriage of such parties or either of them might have been legally solemnized.' (w)

Marriages void if unduly solemnized with the knowledge of both parties.

Sec. 42. 'If any persons (x) shall knowingly and wilfully intermarry after the said first day of March under the provisions of this Act in any place other than the church, chapel, registered building, or office or other place specified in the notice and certificate as aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without license, in case a license is necessary under this Act, or in the absence of a registrar or superintendent registrar where the presence of a registrar or superintendent registrar is necessary under this Act, the marriage of such persons, except in any case herein-after excepted, shall be null and void: Provided always, that nothing herein contained shall extend to annul any marriage legally solemnized according to the provisions of an Act passed in the fourth year of his late Majesty George the Fourth, intituled "An Act for amending the Laws respecting the Solemnization of Marriages in England.'" (y)

4 Geo. 4, c. 76.

(t) Sec. 27 provides for the appropriation of fees on marriages performed in such chapels. By sec. 28, the patron or incumbent may appeal to the archbishop against such licenses.

(u) This sec. is now repealed, see *ante*, p. 278, note (b).

(v) See 1 Vict. c. 22, s. 33, *post*, p. 287.

(w) By sec. 32 the bishop, with consent of the archbishop, may revoke such licenses; in which case, by sec. 33, the registers are to be sent to the incumbent of the parish church. By sec. 34, the registrars of the dioceses are to send to the register office, yearly, lists of the licensed chapels within their districts, and a list of all chapels and buildings registered, to be

the registrar may ask certain particulars of the parties. By sec. 37 all persons vexatiously entering caveats are liable to costs and damages. By sec. 39, (amended by 37 & 38 Vict. c. 35), *ante*, p. 278, note (b), all persons unduly solemnizing marriage are guilty of felony. By sec. 40 the superintendent registrars who unduly issue certificates are guilty of felony; and by section 41 all prosecutions are to be commenced within three years. See also 1 Vict. c. 22, s. 3.

(x) See *post*, p. 297.

(y) By sec. 44, the provisions of the Registry Act are extended to this Act.

By sec. 45, 'this Act shall extend only to England, and shall not extend to the marriage of any of the royal



The 1 Vict. c. 22, (z) s. 23, enacts, that 'the registrar-general, under the direction of one of her Majesty's principal secretaries of state, shall take order that the solemn declaration and form of words provided to be used in the case of marriages under the said Act for marriages be truly and exactly translated into the Welsh tongue, and shall cause the same so translated to be furnished to every registrar of marriages throughout Wales, and in all places where the Welsh tongue is commonly used; and it shall be lawful to use the declaration and form of words so translated, and published by authority, in all places where the Welsh tongue is commonly used or preferred, in such manner and form and to the same intents and purposes as by the said Act is prescribed in the English tongue.'

Provision for marriages in the Welsh tongue.

Sec. 33. 'The banns of marriage of any persons may be published in any chapel licensed by the bishop, according to the provisions of the said Act for marriages, for the solemnization of marriages, in which those persons might lawfully be married; and instead of the notice required by the said Act the words "Banns may be published and marriages may be solemnized in this chapel" shall be placed in some conspicuous part in the interior of every such chapel.'

Banns may be published in chapels where marriages may be solemnized.

Sec. 34, reciting, that 'doubts may arise whether under the said recited Acts it is lawful for the bishop to license chapels for marriages between parties one only of whom resides within the district specified in such license;' enacts that 'all such licenses shall be construed to extend to and authorize marriages in such chapels between parties one or both of whom is or are resident within the said district; provided always, that where the parties to any marriage intended to be solemnized after publication of banns shall reside within different ecclesiastical districts the banns for such marriage shall be published as well in the church or chapel wherein such marriage is intended to be solemnized as in the chapel licensed under the provisions of the said recited Act for the other district within which one of the parties is resident, and if there be no such chapel then in the church or chapel in which the banns of such last-mentioned party might be legally published if the said recited Act had not been passed.'

Marriages may be in licensed chapels, though only one of the parties is resident in the district.

Publication of banns where the parties reside in different districts.

Sec. 35. 'Any building which shall have been licensed and used during one year next before registration for public religious worship as a Roman Catholic chapel exclusively shall be taken to be a separate building for the purpose of being registered for the celebration of marriages, notwithstanding the same shall be under the same roof with any other building, or shall form a part only of a building.'

Any building used exclusively as a Roman Catholic chapel for one year may be registered for celebration of marriages.

The 3 & 4 Vict. c. 72, s. 1, reciting the 4 Geo. 4, c. 76, 6 & 7 Will. 4, c. 85, and 1 Vict. c. 22, and that it is expedient to restrain marriages under the 6 & 7 Will. 4, from being solemnized out of the district in which one of the parties dwells, unless either of the parties dwells in the district, within which there is not any registered building, enacts, 'that it is not and shall not be lawful for any superintendent registrar to give any certificate of notice of marriage where the building in which the marriage is to be

Certificate of notice not to be granted for marriages out

(z) The 37 & 38 Vict. c. 35, repeals Sec. 26, from "for by an act," to "for this Act in part, namely, secs. 7 and 21." marriages in England," and sec. 32.

of the district where the parties dwell, &c.

In what case marriage may be solemnized out of the district in which the parties dwell.

Provision as to marriages of members of the Society of Friends, and Jews.

No notice of marriage to be read or published before Poor-law guardians, or be transmitted to the clerk of such guardians.

Every notice of marriage to be accom-

solemnized, as stated in the notice, shall not be within the district wherein one of the parties shall have dwelt for the time required by the said Act of his late Majesty, except as hereinafter is enacted.'

Sec. 2. 'It shall be lawful for any party intending marriage under the provisions of the said Act of his late Majesty, in addition to the notice required to be given by that Act, to declare at the time of giving such notice, by indorsement thereon, the religious appellation of the body of Christians to which the party professeth to belong, and the form, rite, or ceremony which the parties desire to adopt in solemnizing their marriage, and that, to the best of his or her knowledge and belief, there is not within the district in which one of the parties dwells any registered building in which marriage is solemnized according to such form, rite, or ceremony, and the district nearest to the residence of that party in which a building is registered wherein marriage is so solemnized, and the registered building within such district in which it is intended to solemnize their marriage; and after the expiration of seven days or twenty-one days, as the case may require, under the said Act of his late Majesty, it shall be lawful for the superintendent registrar to whom any such notice shall have been given to issue his certificate, according to the provisions of that Act; and after the issuing of such certificate the parties shall be at liberty to solemnize their marriage in the registered building stated in such notice: Provided always, that after any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the truth of the facts herein authorized to be stated in the notice, nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage.' (a)

Sec. 5. 'Notwithstanding anything herein or in the said recited Acts or either of them contained, the Society of Friends commonly called Quakers, and also persons professing the Jewish religion, may lawfully continue to contract and solemnize marriage according to the usages of the said society and of the said persons respectively, after notice for that purpose duly given, and certificate or certificates duly issued, pursuant to the provision of the said recited Act of his late Majesty, notwithstanding the building or place wherein such marriage may be contracted or solemnized be not situate within the district or either of the districts (as the case may be) in which the parties shall respectively dwell.'

The 19 & 20 Vict. c. 119, which came into force Jan. 1, 1857, recites that it is expedient to alter and amend the 6 & 7 Will. 4, c. 85, 1 Vict. c. 22, and 3 & 4 Vict. c. 72, and by sec. 1 enacts, 'In case of any party intending marriage under the provisions of any of the said recited Acts or of this Act, no notice of such intended marriage shall be read or published before the guardians of any Poor-law union or parish or place, or be transmitted by any superintendent registrar to the clerk of any such guardians.'

Sec. 2. 'In case any party shall intend marriage, under the provisions of any of the said recited Acts or of this Act, the party

(a) See the 19 & 20 Vict. c. 119, ss. 13, 14, *post*, p. 292.

so intending marriage shall, at the time of giving to the superintendent registrar or respective superintendent registrars, as the case may be, the notice required by the said recited Acts or either of them, make and sign or subscribe a solemn declaration in writing, in the body or at the foot of such notice, that he or she believes that there is no impediment of kindred or alliance or other lawful hindrance to the said marriage, and that the parties to the said marriage, in case the marriage is intended to be had without license, have, for the space of seven days immediately preceding the giving of such notice, had their usual place of abode and residence within the district of the superintendent registrar or respective superintendent registrars to whom such notice or notices, as the case may be, shall be so given; or, in case such marriage is intended to be had by license, that one of the said parties hath for the space of fifteen days immediately preceding the giving of such notice had his or her usual place of abode and residence within the district of the superintendent registrar to whom such notice shall be so given; and when either of the parties intending marriage, and not being a widower or widow, shall be under the age of twenty-one years, the party making such declaration shall further declare that the consent of the person or persons whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent to such marriage is by law required; and every declaration so made as aforesaid shall be signed and subscribed, by the party making the same, in the presence of the superintendent registrar to whom the notice of marriage containing such declaration is given, or in the presence of his deputy, or of some registrar of births and deaths or of marriages for the district in which the party giving such notice resides, or of the deputy of such registrar, who shall respectively attest the same by adding thereto his name, description, and place of abode; and no certificate or license for marriage shall be issued or granted pursuant to any such notice as aforesaid unless the said notice be accompanied by such solemn declaration duly made and signed or subscribed and attested as aforesaid; and every person who shall knowingly or wilfully make and sign or subscribe any false declaration, or who shall sign any false notice for the purpose of procuring any marriage under the provisions of any of the said recited Acts or this Act, shall suffer the penalties of perjury. (b)

Sec. 3. 'Every notice of marriage which shall be given under the provisions of any of the said recited Acts or of this Act, after this Act shall have come into operation, shall be in the form of Schedule (A.) to this Act annexed, or to the like effect; and in every case where the marriage is intended to be had and solemnized under the provisions of the said recited Act of the third and fourth years of Her Majesty, chapter seventy-two, such notice shall, in addition to the several particulars comprised in the said schedule, contain the declaration required to be made by one of

panied by a solemn declaration, by one of the parties, that there is no lawful hindrance to such marriage, &c.

Persons making wilfully false declarations to suffer the penalties of perjury.

Form of notice of marriage.

(b) A man may change his surname by use and reputation, and if by use and reputation he has acquired a new one, he is not indictable under the 19 & 20 Vict. c. 19, s. 2, for using the new name

in signing a notice for the purpose of procuring his marriage under the 6 & 7 Will. 4, c. 85. *R. v. John Smith*, 4 F. & F. 1099.

the parties to such intended marriage, pursuant to the second section of the said last-mentioned Act; and the superintendent registrar to whom any such notice of marriage shall be so given shall forthwith enter the particulars and the date thereof, and the name of the party giving the same, into the marriage notice book; and for every such entry the superintendent registrar shall be entitled to have a fee of one shilling.'

Notice of marriage without license to be affixed in superintendent registrar's office.

Sec. 4. 'In case any party shall intend marriage without license under the provisions of any of the said recited Acts or of this Act, the superintendent registrar to whom notice of such intended marriage has been given shall cause the notice of marriage, or a true and exact copy thereof, as entered in the marriage notice book, under the hand of such superintendent registrar, to be suspended or affixed in some conspicuous place in the office of the said superintendent registrar during twenty-one successive days next after the day of the entry of such notice in his "Marriage notice book," before any marriage shall be solemnized in pursuance of such notice, and after the expiration of twenty-one days next after the day of the entry of such notice in his "Marriage notice book," the superintendent registrar shall issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in Schedule (B.) to this Act annexed, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar, and provided the issue of such certificate shall not have been forbidden in the manner provided by either of the said firstly and secondly recited Acts by some person or persons authorized in that behalf; and every such certificate shall state the particulars set forth in the said notice, and the day on which the same notice was entered, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have and receive a fee of one shilling; and at any time within three calendar months next after the day of the entry of such notice the intended marriage may be solemnized under the authority of the said certificate; and every superintendent registrar's certificate for marriage duly issued under the provisions of this Act shall have the same force, validity, and effect as the like certificate issued under the provisions of the said recited Acts or either of them would have had in case this Act had not been passed.'

Notice of marriage by license not to be suspended in the office of the superintendent registrar.

Sec. 5. 'In case any party shall intend marriage by license under the provisions of any of the said recited Acts or of this Act, notice of such intended marriage shall not be suspended in the office of the superintendent registrar, but the party giving the same shall state therein that such marriage is intended to be celebrated by license.'

In case of marriage by license, notice given to the superintendent registrar of one district shall be sufficient.

Sec. 6. 'In any case of marriage intended to be solemnized by license, under the provisions of either of the said two firstly recited Acts or of this Act, between parties both of whom do not dwell in the same superintendent registrar's district, it shall not be required that notice of such intended marriage shall be given to more than one superintendent registrar, but a notice to the super-

intendent registrar of the district in which one of the parties so intending marriage resides shall be sufficient; and it shall not be required that the said notice shall state how long each of the said parties has resided in his or her dwelling-place, but only how long the party residing in the district in which the notice is given has so resided.' (c)

Sec. 9. 'Every superintendent registrar receiving notice of an intended marriage to be solemnized by license as aforesaid shall, after the expiration of one whole day next after the day of the entry of such notice in his "Marriage notice book," issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in the said Schedule (B.) to this Act annexed, and also a license to marry, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar, and provided the issue of such certificate shall not have been forbidden in the manner provided by either of the said firstly and secondly recited Acts by some person or persons authorized in that behalf; and every such certificate shall state the particulars set forth in the said notice, and the day on which the same notice was entered, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have and receive a fee of one shilling; and, at any time within three calendar months next after the day of the entry of such notice, the intended marriage may be solemnized under the authority of the said license; and every superintendent registrar's certificate and license for marriage duly issued under the provisions of this Act shall have the same force, validity, and effect as the like certificate and license issued under the provisions of the said recited Acts or either of them would have had in case this Act had not been passed.'

In cases of marriage by license certificate of the notice thereof may be given by the superintendent registrar (unless the marriage be forbidden), and thereupon the marriage may be solemnized.

Sec. 10. 'The form of a license for marriage so to be granted as aforesaid to any party or parties, by the superintendent registrar of any district as aforesaid, shall be in the form or to the effect of the license set forth in Schedule (C.) to this Act annexed; and for every such license the superintendent registrar granting the same shall be entitled to have and receive of the party requiring the same the sum of one pound ten shillings, over and above the amount paid for the stamps necessary on granting such license.'

Form of license for marriage.

Sec. 11. 'No such marriage as aforesaid shall be solemnized in any such registered building without the consent of the minister or of one of the trustees, owners, deacons, or managers thereof, nor in any registered building of the Church of Rome without the consent of the officiating minister thereof, nor in any church or chapel of the united Church of England and Ireland without the consent of the minister thereof, nor in such latter case by any other than a duly qualified clergyman of the said united church, or with any other forms or ceremonies than those of the said

Mode of solemnizing marriages in registered buildings.

(c) By sec. 7, notice of marriage without license may be given in Ireland if one of the parties reside there, and marriages where such notices have been given in Ireland are legalised; and by sec. 8, a

certificate of proclamation of banns in Scotland as to a party resident there is made equivalent to the superintendent registrar's certificate.

united church, any statute or statutes to the contrary notwithstanding.'

Persons desirous may add the religious ceremony ordained by the church.

Sec. 12. 'If the parties to any marriage contracted at the registry office of any district conformably to the said recited Acts or any of them, or to the provisions of this Act, shall desire to add the religious ceremony ordained or used by the church or persuasion of which such parties shall be members to the marriage so contracted, it shall be competent for them to present themselves for that purpose to a clergyman or minister of the church or persuasion of which such parties shall be members, having given notice to such clergyman or minister of their intention so to do ; and such clergyman or minister, upon the production of their certificate of marriage before the superintendent registrar, and upon the payment of the customary fees (if any), may, if he shall see fit, in the church or chapel whereof he is the regular minister, by himself or by some minister nominated by him, read or celebrate the marriage service of the persuasion to which such minister shall belong : Provided always, that no minister of religion who is not in holy orders of the united Church of England and Ireland shall under the provisions of this Act officiate in any church or chapel of the united Church of England and Ireland ; but nothing in the reading or celebration of such service shall be held to supersede or invalidate any marriage so previously contracted, nor shall such reading or celebration be entered as a marriage among the marriages in the parish register : Provided also, that at no marriage solemnized at the registry office of any district shall any religious service be used at the registry office.'

Superintendent registrar to whom notice is given, may grant license for marriage (under 3 & 4 Vict. c. 72) in a district in which neither of the parties resides.

Sec. 13. 'When any marriage is intended to be solemnized between parties not of the Society of Friends commonly called Quakers, or not professing the Jewish religion, by license under the provisions of the before-recited Act of the third and fourth years of her Majesty, chapter seventy-two, in a registered building situated in a district within which neither of the parties resides, it shall be lawful for the superintendent registrar to whom notice of such intended marriage shall have been given to grant to the party applying for the same a license for such marriage to be solemnized in the registered building stated in such notice ; and every license and certificate granted in pursuance of this enactment shall be as valid and effectual to all intents and purposes as if the same had been granted by the superintendent registrar of the district in which the registered building wherein the marriage is intended to be solemnized is situated.'

Superintendent registrar may grant license for marriage to be solemnized in registered building out of the district wherein the parties reside.

Sec. 14. 'When any marriage is intended to be solemnized, under the provisions of any of the before-recited Acts or of this Act, in the usual place of worship of the parties so intending marriage, or one of them, and such place of worship shall be a registered building situated out of the district of their, his, or her residence, it shall be lawful for the superintendent registrar or respective superintendent registrars to whom notice of such marriage shall have been given to grant to the party applying for the same a license or certificate, as the case may be, for such marriage to be solemnized in the registered building stated in such notice, provided such building be situated not more than two miles beyond the limits of the district in which the notice of such marriage has

been given, and the party giving notice of such marriage shall at the time of giving the same state therein, in addition to the description of the building in which the marriage is to be solemnized, that it is the usual place of worship of one of the parties, and shall also state the name of the party whose usual place of worship it is; and every license and certificate granted in pursuance of this enactment shall be as valid and effectual, to all intents and purposes, as if the same had been granted by the superintendent registrar of the district in which the registered building wherein the marriage is intended to be solemnized is situated.' (d)

Sec. 17. 'After any marriage shall have been solemnized, under the authority of any of the said recited Acts or of this Act, it shall not be necessary in support of such marriage to give any proof of the actual dwelling or of the period of dwelling of either of the parties previous to the marriage within the district stated in any notice of marriage to be that of his or her residence, or of the consent to any marriage having been given by any person whose consent thereto is required by law, or that the registered building in which any marriage may have been solemnized had been certified according to law as a place of religious worship, or that such building was the usual place of worship of either of the parties, nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage; and all marriages which heretofore have been or which hereafter may be had or solemnized, under the authority of any of the said recited Acts or of this Act, in any building or place of worship which has been registered pursuant to the provisions of the said Act passed in the sixth and seventh years of his late Majesty King William the Fourth, chapter eighty-five, but which may not have been certified as required by law, shall be as valid in all respects as if such place of worship had been so certified.' (e)

Sec. 21. 'Any marriage according to the usages of the Society of Friends commonly called Quakers, or to the usages of persons professing the Jewish religion respectively, where the parties thereto are both members of the said Society or both persons professing the Jewish religion respectively, may be solemnized by license (which license the superintendent registrar to whom notice of the intended marriage shall have been given is hereby authorized to grant, in the form or to the effect set forth in the said Schedule (C.) to this Act annexed), as effectually in all respects as if such marriage were solemnized after the issue of a certificate by such superintendent registrar in the manner provided by the said recited Acts or any of them; and the provisions in this present Act contained in relation to the solemn declaration to be made by the party intending marriage, and to the statement to be contained in

Proof of the observance of this Act and of the recited Acts in certain matters is not to be necessary to the validity of marriages.

Marriages of Quakers or Jews may be solemnized by license.

(d) By sec. 15, the registrar general may appoint registrars of marriages; and the appointments of registrars of marriages by superintendent registrars are to be subject to his approval. By sec. 16, the registrar of marriages may appoint a deputy, and where such registrar dies or ceases to hold the office, his deputy is to be registrar until a new registrar is appointed.

(e) By sec. 18, persons making false

declarations, or giving false notices, or forbidding the granting of a certificate by falsely representing their consent to be required by law, are liable to the penalties of perjury. By sec. 19, in the case of fraudulent marriages, the guilty party is to forfeit all the property accruing from the marriage. By sec. 20, nothing in the Act is to affect the provisions of the existing Acts, except when they are at variance with this Act.

the notice of such intended marriage that such marriage is intended to be celebrated by license, and to the notice to be given of any such intended marriage by license, and to the giving of certificates in the form or to the effect set forth in Schedule (B.) to this Act annexed, and to the fee and stamp to be paid for such license, shall be applicable in all respects to every such marriage to be solemnized by license according to the usages of the said Society or to the usages of persons professing the Jewish religion respectively.' (*f*)

Marriages under this Act good and cognizable.

Extra-parochial places.

Sec. 23. 'Every marriage solemnized under any of the said recited Acts or of this Act shall be good and cognizable in like manner as marriages before the passing of the first-recited Act according to the rights of the Church of England.' (*g*)

The 20 Vict. c. 19, provides for the turning of certain extra-parochial places into parishes, and where any such place has a church or chapel of the Church of England within it, the bishop of the diocese may authorize the publication of banns and the solemnization of marriages by banns or license in it. (*h*) And all the provisions as to keeping of marriage registers are extended to such church or chapel. (*i*)

The 23 & 24 Vict. c. 24, renders marriages celebrated in any such church or chapel valid where both or either of the parties reside in such district, provided the banns are published in both districts where the parties reside in different districts.

A marriage is good by banns or license where the party is married in an assumed name, if he be known in the place where he is married by such assumed name.

The marriage Acts do not specify what shall be necessary to be observed in the publication of banns, or that the banns shall be published in the *true names* of the parties; but it must be understood as the clear intention of the legislature that the banns shall be published in the true names, because it requires that notice in writing shall be delivered to the minister of the true Christian names and surnames of the parties seven days before the publication; and, unless such notice be given, he is not obliged to publish the banns. But a publication in the name which the party has assumed, and by which he is known in the parish, appears to be sufficient, and would, indeed, be the proper publication where the party is not known by his real name. Thus, where a person, whose baptismal and surname was Abraham Langley, was married by banns by the name of George Smith, having been known in the parish where he resided and was married by that name only from his first coming into the parish till his marriage, which was about three years, the marriage was held valid. (*j*) And a marriage by license, not in the party's real name, but in the name which he had assumed, because he had deserted, he being known by that name only in the place where he lodged and was married, and where he had resided sixteen weeks, was also held valid. Lord Ellenborough, C. J., said, 'If this name had been assumed for the purpose of fraud in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be

(*f*) By sec. 22, the registrar general is to furnish marriage register books and forms to each certified secretary of a synagogue of British Jews.

(*g*) Sec. 24 recites the 15 & 16 Vict. c. 36, and enacts that the registrar general shall allow searches, and give ex-

tracts from the returns of certified places of worship. By sec. 25, the Act does not extend to Scotland or Ireland.

(*h*) Sec. 9.

(*i*) Sec. 10.

(*j*) Rex v. Billinghurst, 3 M. & S. 250.



married, that would have been a fraud on the marriage Act and the rights of marriage, and the Court would not have given effect to any such corrupt purpose. But where a name has been previously assumed, so as to have become the name which the party has acquired by reputation, that is, within the meaning of the marriage Act, the party's true name.' (*k*)

Under the 26 Geo. 2, c. 33, if there was a total variation of a name or names, that is, if the banns were published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in pursuance of that publication was invalid; and it was immaterial in such cases, whether the misdescription had arisen from accident or design, or whether such design was fraudulent or not. The pauper and her husband were married in 1817, by banns, by the names of Mary White and Joseph Betts. The husband had been baptized as the son of J. and M. Betts. M. Betts was the daughter of S. Wilson, and her husband having absconded shortly after their marriage, the pauper's husband was brought up by S. Wilson, and always called by the name of Wilson, and never called or known by any other name either before or after his marriage. The pauper was the daughter of J. and M. Hodgkinson, and was never called or known by any name except Hodgkinson till after her marriage, but in the register of her baptism she was described as 'Mary the daughter of S. White and his wife,' which entry was believed to have been a mistake of the clergyman who baptized her. It was held that the marriage was void. Whether the husband was sufficiently designated by the name of Betts it was unnecessary to inquire, as the Court were clearly of opinion that the woman was never known by, and never used the surname of 'White,' so as to make that, in any latitude of construction, 'a true name' within the meaning of the 26 Geo. 2, c. 33, s. 2. (*l*)

But under the 26 Geo. 2, c. 33, if there were a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names had been such as the parties had used, and been known by, at one time, and not at another; in such cases the publication might, or might not be void; the supposed misdescription might be explained, and it became a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. (*m*)

But the words of the 4 Geo. 4, c. 76, s. 22, are wholly different from those of the 26 Geo. 2, c. 33, s. 8, and it has been held that in order to invalidate a marriage under the 4 Geo. 4, c. 76, s. 22, it must be contracted with a knowledge by *both* parties that no due publication of the banns has taken place. Where, therefore, J. C. told Susannah Spencer that he would see the banns properly published, and she took no steps in the matter, and he told her that they had been published, but procured the banns to be published in the name of Agnes Watts, which name she had never borne;

Banns published in entirely wrong name, under 26 Geo. 2, c. 33.

Partial variation in the name.

Under the 4 Geo. 4, c. 76, both parties must know that there has been no due publication of banns.

(*k*) *Rex v. Burton-upon-Trent*, 3 M. & S. 537.

(*l*) *Rex v. Tibshelf*, 1 B. & Ad. 190.

(*m*) Per Lord Tenterden, C. J. See *Sullivan v. Sullivan*, 2 Hagg. C. R.

254; *Frankland v. Nicholson*, 3 M. & S. 261, 1 Phil. R. 147; *Pougett v. Tomkins*, 3 M. & S. 263; *Mather v. Ney*, 3

and in performing the service, the clergyman applied to her the name of Agnes, till which time she believed she was about to be married by her own name, and she did not know, until after the marriage, that the banns had been published in a wrong name; it was held that the marriage was valid. (*n*) But where both the man and the woman were aware that the banns had been published in a manner to conceal the identity of one of them, it was held that the marriage was void. (*o*)

Omission of one Christian name and false addition, known by both parties.

Edward Croxall Tongue, a minor, of the age of seventeen years, and Mary Ann Allen, a widow, of the age of thirty-five years, were married in 1833 by banns, which were published in the names of Edward Tongue, bachelor, and Mary Ann Allen, spinster; the entry in the register was in the same names and descriptions, and was signed Edward Tongue. The marriage was clandestine and without the knowledge or consent of the parents of Tongue, who was baptized by the names of Edward Croxall Tongue, and though known to some persons by the name of Croxall Tongue or Tongue only, was never known by the name of Edward Tongue. It was admitted that the woman was cognizant of the fraud and intended it; and it was held that as the entry in the register was, Edward Tongue and Mary Ann Allen were married by banns, it was impossible for him not to have known of the publication of the banns; and the signature of only one of his Christian names showed that he must have known that the banns had been published in that name only; and, therefore, he, with the woman, knowingly and wilfully intermarried without due publication of banns. (*p*)

Wrong Christian name used by the man with consent of the woman.

One Wood was baptized and had always been known by the name of Bower Wood, and never by the name of John Wood, and his banns were published in the names of Margaret Midgley and John Wood; after the first publication the wife told Wood that the name John Wood was wrong. He said it was one of his names, though he had never been called by it; she asked him why he used the name John? He said it was for fear any of his relations should know of his marrying her. She wished him to use the name of Bower; he said he should be disinherited if he did; she asked him if the marriage would be legal under the name of John; he said it would. It was a long time before she would consent to being married to him in the name of John. She did so because he said if she loved him she would marry him in that name, and would trust to him afterwards. On the 12th of April, 1852, they were married in the names of Margaret Midgley and John Wood. Cresswell, J. O., held that there was not a due publication of banns, as Wood was described in them as John Wood, and both parties were aware of this misdescription when the marriage was solemnized, and therefore the marriage was invalid. (*q*)

Assuming a fictitious name

It seems that the assuming a fictitious name, upon the second

(*n*) *Rex v. Wroxton*, 4 B. & Ad. 640, 1 N. & M. 712; *Gompertz v. Kensit*, 41 L. J. Ch. 382.

(*o*) *Wiltshire v. Wiltshire*, 3 Hagg. Ecc. R. 332.

(*p*) *Tongue v. Tongue*, 1 Moore, P. C. 90. There was also evidence that it was the regular course to make the parties examine the entry in the banns book, be-

fore a marriage, and see that their names and descriptions were right, and the witness added that she should not have been present at the marriage as a witness, unless the banns had been regularly published.

(*q*) *Midgley v. Wood*, 30 Law J., D. & M. 57.

marriage, will not prevent the offence from being complete. (r) And it was decided to be no ground of defence, that upon the second marriage (which was by banns) the parties passed by false Christian names when the banns were published, and when the marriage took place; and it was further holden that the prisoner, having written down the names for the publication of the banns, was precluded thereby from saying that the woman was not known by the name he delivered in, and that she was not rightly described by that name in the indictment. The indictment was against the prisoner for marrying Anna Timson whilst he had a wife living: the second marriage was by banns; and, it appeared, that the prisoner wrote the note for the publication of the banns, in which the woman was called Anna, and that she was married by that name, but that her real name was Susannah. Upon a case reserved two questions were made: one, whether this marriage was not void, because there was no publication of banns by the woman's right name, and that, if the second marriage were void, it created no offence: and the other question was, whether the charge of the prisoner's marrying Anna was proved. But the judges held, unanimously, that the second marriage was sufficient to constitute the offence; and that, after having called the woman 'Anna' in the note he gave in for the publication of banns, it did not lie in the prisoner's mouth to say, that she was not known as well by the name of Anna as by that of Susannah, or that she was not rightly called by the name of Anna in the indictment. (s)

on the second marriage.

So where the prisoner contracted the second marriage in the maiden name of his mother, and the woman he married had also made use of her mother's maiden name, it was unanimously resolved by all the judges that the prisoner was rightly convicted. (t) So where the second wife had never gone or been known by the name of Thick, but had assumed it when the banns were published, that her neighbours might not know she was the person intended, it was held that the parties could not be allowed to evade the punishment for their offence, by contracting a concerted invalid marriage. (u) But where it was proved, by a person present at the prisoner's second marriage, that the woman was married to him by the name of Hannah Wilkinson (the name laid in the indictment), but there was no other proof that the woman was in fact Hannah Wilkinson; it was held that the proof was insufficient, and that to make it sufficient there should have been proof that the prisoner was married to a certain woman by the name of, and who called herself H. Wilkinson, whereas, in fact, there was no proof that such was her name, or that she had ever before gone by that name; and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. (v)

The prisoner was married a second time before the registrar describing himself as Benjamin Rea, his true name being Edward

Marriage before a registrar in a wrong name.

(r) *Rex v. Allison*, *post*, p. 314. And see *R. v. Allen*, *ante*, p. 268, and the question as to the second marriage there discussed.

(s) *Rex v. Edwards*, MS. Bayley, J., and R. & R. 283.

(t) *Palmer's case*, 1 Deac. Dig. Cr. L.

147. *Rosc. C. E.* 280.

(u) *Rex v. Penson*, 5 C. & P. 412. Gurney, B. See *Reg. v. Orgill*, 9 C. & P. 80.

(v) *Drake's case*, 1 Lewin, 25. Parke, J. It was suggested as to this being the second marriage.

Rea. There was no evidence to show the wife knew of this, and the man was held to be rightly convicted of bigamy, as the effect of the statute 6 & 7 Will. 4, c. 85, ss. 4, 42, is to render invalid a marriage where both the parties, and not one only, knowingly intermarry without due notice. (*w*)

Marriage by  
license in a  
wrong name.

A marriage celebrated under a license, in which one of the parties is described by a name wholly different from his own, is not therefore void. George Rudman was taken into custody as the reputed father of a child, of which a woman was pregnant, and married her by license. He gave his name as George Neate at the times of the apprehension and marriage, and was named so in the license, but had never gone by that name before; and the Court of Queen's Bench held this marriage valid. (*x*)

Where a marriage was solemnized by license, in which the woman's name was Margaret Bevan; her baptismal name and that by which she was commonly called being 'Margaret Lea Bevan': the license was obtained in the altered name by the man, who knowingly, and by direction of the woman, suppressed the name of 'Lea,' and gave false places of residence, in order that the surrogate might not know who the woman was, and that the intended marriage might be kept secret from her friends; it was held that the question was whether the woman was married without a 'license from a person or persons having authority to grant the same.' There was no doubt the person who granted the license had authority to grant it, and it came therefore to the question whether this was a license for the woman. It was clear that an altered name might represent a person; therefore the name 'Margaret Bevan' might represent her, and as the license was obtained for her and by her direction from a person who had authority to grant it, the marriage was not void. (*y*)

Evidence of a  
marriage by  
special license.

On the trial of an ejectment in 1842, a marriage was said to have taken place in August in 1784, at a private house under a special license from the Archbishop of Canterbury. There was some evidence of cohabitation and reception: but the plaintiff's counsel offered in evidence an affidavit made for the purpose of obtaining a special license to be married at a private house, and a fiat signed by the Archbishop, directing a license to be made out, as prayed, for a marriage between the parties; both which documents were produced from the Office of Faculties, the proper ecclesiastical office. No search had been made for the original license; and there was proof that such licenses were not kept in any regular custody, but were generally handed over to the officiating clergyman and not taken back from him. A copy of the register of the parish of St. Pancras, which stated the marriage to have been at a private house, by special license, and professed to be signed by the parties, was also offered in evidence. Objection was taken to the fiat as being secondary evidence of the contents of the license, for which no search had been made; but

(*w*) *R. v. Rea*, L. R. 1 C. C. R., 41 L. J. M. C. 92. The Court did not say there would have been no offence if both parties had known of the false statement. See *Holmes v. Simmons*, L. R. 1 P. & M. 523.

(*x*) *Lane v. Goodwin*, 4 C. B. 361. But

if a license were obtained for one person with the intention that it should be used for another, such a license might not be valid. *Patteson, J. Ibid.*

(*y*) *Bevan v. M'Mahon*, 30 Law J., D. & M. 61.

the evidence was admitted; and the Court of Queen's Bench held that it was properly received, as the fiat was an act done in the course of official duty, showing that two persons bearing the names of the lessor of the plaintiff's parents were at that time engaged in taking measures for contracting a marriage; and that it might properly be taken into consideration by the jury as confirming the evidence of their union, which arose from cohabitation and reception. The affidavit and register were proofs of the same general fact. (z)

A marriage solemnized by license since the 4 Geo. 4, c. 76, without consent of parents, where one of the parties is a minor, is valid: for the section, which requires such consent, is only directory. The pauper, being under the age of twenty-one years, was married in 1826, by license, without the consent of his father, who was then living; it was objected that this marriage was void under the 4 Geo. 4, c. 76, for want of the father's consent; but it was held that the marriage was valid. The language of sec. 16 (b) is merely to *require* consent; it does not proceed to make the marriage void, if solemnized without consent. Sec. 22 declares that certain marriages shall be null and void, and a marriage by license without consent is not specified; and if there were any doubt, it is removed by sec. 23, which in such a case enacts, not that the marriage shall be void, but that all the property accruing from the marriage shall be forfeited. (c)

Unless a clergyman in holy orders was present at the marriage ceremony, the marriage was null and void at common law before the marriage Act. Where, therefore, A., a member of the established Church in Ireland, went, in 1829, accompanied by B., a Presbyterian, to the house of C., a regularly placed minister of the Presbyterians of the parish where C. resided, and there entered into a present contract of marriage with the said B., the minister performing a religious ceremony between them, according to the rites of the Presbyterian church, and A. and B. lived together as man and wife for some time afterwards; but A., afterwards during B.'s life, married another person in a parish church in England; it was held, on an indictment for bigamy, that the first contract thus entered into was not sufficient to support the indictment. (d)

Since the 4 Geo. 4, c. 76, a marriage by a minor without consent is valid. (a)

A clergyman in holy orders must be present by the common law.

(z) Doe dem. Earl of Egremont, v. Grazebrook, 4 Q. B. 406. In the argument it is said that 'the performance of a ceremony was proved;' but the ceremony was shown to have been performed in a private house.' 'The same parties went through the ceremony, which, at any rate, was professedly a marriage.' See Doe dem. France v. Andrews, 15 Q. B. 756, as to the entry in the register.

(a) If the prisoner prove that his first marriage took place while he was a minor, and while the 26 Geo. 2, c. 33, was in force, it must be shown on the part of the prosecution, that such marriage, if by license, was with the proper consent. Rex v. Butler, Mich. T. 1803. MS. Bayley, J., and R. & R. 61; Rex v. Morton, cor. Wilson, J., Newcastle, 1789. MS. Bayley, J., and R. & R. 19, note

(a). James's case, R. & R. 17. Though illegitimate children are regarded by the law as not having any father, yet they were held to be within the marriage Act of 26 Geo. 2; Rex v. Hodnett, 1 T. R. 96; Rex v. Edmonton, Cald. 435; Horner v. Liddiard, Rep. by Dr. Croke; Priestley v. Hughes, 11 East, 1.

(b) See the sec. ante, p. 276.

(c) Rex v. Birmingham, 8 B. & C. 29, S. C. 2 M. & R. 230. Reg. v. Clark, 2 Cox, C. C. 183.

(d) Reg. v. Millis, 10 Cl. & F. 534. March 1843. In the Queen's Bench in Ireland, Perrin and Crampton, JJ., held the first marriage good: but Pennefather, C. J., and Burton, J., held it to be void. In order that error might be brought in the House of Lords, Perrin, J., withdrew his opinion, and judgment was given for the prisoner. In the House of Lords,

Unless one cannot be procured.

A clergyman cannot marry himself.

In support of a marriage under the 6 & 7 Will. 4, c. 85, it is not necessary to produce or prove the notice of marriage, or to prove that it took place in the building specified in the notice.

Proof of a marriage under the 6 & 7 Will. 4, c. 85.

But the preceding case must not be taken to decide that marriages of British subjects in the colonies, or on board ship or elsewhere, where a clergyman cannot be obtained, are invalid. Indeed in a case in India where no clergyman could be obtained, it was held that the preceding decision did not apply. (e)

The law does not admit of any difference, as to the manner in which a marriage is to be celebrated, between the marriage of a clergyman and a layman, and consequently if the bridegroom be a clergyman in holy orders, and perform the ceremony himself, no other clergyman being present, the marriage is invalid. (f)

Where, on an indictment for bigamy, it appeared that the first marriage professed to be under the provisions of the 6 & 7 Will. 4, c. 85, and the superintendent registrar produced the register returned to him by the registrar, who proved that he was present at the marriage, that it was registered, that the parties signed their names, and he witnessed it; and the superintendent registrar produced the register of the place where the marriage was celebrated, and the certificate he issued was produced and proved by him. A witness stated that he was present at the marriage, and that notice of it was duly given to the superintendent registrar, but the latter did not produce it, and said, if he had received it, he had left it at home; it was contended, on behalf of the prisoner, that it was incumbent on the prosecution to show that the first marriage was celebrated in the registered building specified in the notice and certificate, to prove that due notice had been given to the superintendent registrar, and that the certificate of the notice had been duly issued. But, on a case reserved, all the judges present held the evidence sufficient. (g)

Upon an indictment for bigamy, which alleged that the prisoner, in July 1848, married Eliza Goodman in a Wesleyan chapel duly licensed for marriages, and afterwards and in her lifetime married E. Outley, a witness proved that he was present at the first marriage at the Wesleyan chapel at Dunstable, in the presence of the registrar, and signed the register as a witness, and that the parties lived together as man and wife for two or three years. A witness proved that a certificate of this marriage was examined by him with the register book, kept at the office of the superintendent registrar of the district of Luton, within which Dunstable was, and that it was correct, and that it was signed

Lords Brougham, Denman, and Campbell held the first marriage good; but the Lord Chancellor (Lyndhurst), Lord Cottenham, and Lord Abinger held it void; whereupon, according to the ancient rule in the law, *semper præsumitur pro negante*, judgment was given for the defendant; and in *Beamish v. Beamish*, *infra*, it was held that this judgment was as much binding as if it had been pronounced *nemine dissente*. On the authority of this case, it was held that a marriage solemnized at the consulate office at Beyrout in Syria, according to the rites of the Church of England, between two British subjects who were members of that church, by an American missionary, who was not a priest in holy orders, was void. *Lyndhurst v. Easton*,

13 M. & W. 261. 1844. See the 12 & 13 Vict. c. 68, *post*, p. 311. See R. v. Mainwaring, 26 L. J. M. C. 10; Dear & B. 132.

(e) *Maclean v. Cristall*, Per. Oriental Cas. 75. And the Lords, in *Beamish v. Beamish*, *infra*, expressly declared that this question was not decided by the preceding case.

(f) *Beamish v. Beamish*, 9 H. L. C. 274.

(g) *Reg. v. Hawes*, 1 Den. C. C. 270. As the production of the original register of marriages cannot be enforced, a witness, who has seen the register, may prove the handwriting of a party to a marriage therein registered, although such register be not produced. *Sayer v. Crossop*, 2 Exc. R. 409.

by the superintendent registrar. This certificate contained a copy of the register, which the registrar certified to be correct. The witness also proved that he examined another certificate with the register book at the office of the superintendent registrar, and that it was correctly extracted, and was signed by the superintendent registrar in his presence. (h) The witness also proved that another document was signed in his presence by the superintendent registrar, and that he examined it with the register at his office, and found it was correctly extracted. (i) The reception of these documents was objected to, on the ground that certificates were not admissible to prove a marriage in a Wesleyan chapel, or that it was a place in which a marriage could be legally solemnized, or that, if admissible, they must be authenticated by the official seal of the registrar, and not under hand only. But the documents were admitted, and the prisoner convicted; and it was held that the conviction was right, upon the ground that, independently of the two last-mentioned documents, there was *prima facie* evidence that the chapel was duly registered, and was therefore a place in which marriages might be legally solemnized. The presence of the registrar at the marriage, the fact of the ceremony taking place, and the entry in the registrar's book, aided, as they were, by the presumption *omnia rite esse acta*, afforded *prima facie* evidence that the chapel was a duly registered place, in which marriages might be legally celebrated. (j) So where on an indictment for bigamy the prisoner was shown to have been secondly married at a Wesleyan chapel not registered under the 15 & 16 Vict. c. 36, in June 1857, and

(h) This certificate was, 'I, the undersigned, T. E. Austin, Superintendent Registrar of the district of Luton, &c., do hereby certify that the Wesleyan chapel, situate at Dunstable, in the county of Bedford, was duly registered for the solemnization of marriages, pursuant to the Act 6 & 7 Will. 4, c. 85, on the twenty-eighth day of November, 1845. Given under my hand, &c., Thos. Erskine Austin.'

(i) This document was, 'Henry Manwaring and Eliza Goodman were married after notice, read at the Board of Guardians of the Luton Union, without license. Thos. Erskine Austin, Superintendent Registrar.'

(j) *Reg. v. Manwaring*, D. & B. C. C. 132; Pollock, C. B. and Willes, J., thought that the certificate that the chapel had been duly registered was admissible and evidence of the fact. The 6 & 7 Will. 4, cc. 85, 86; 1 Viet. c. 22; 3 & 4 Viet. c. 92; 8 & 9 Viet. c. 113; 9 & 10 Viet. c. 119; and 14 & 15 Viet. c. 99, were referred to on the trial. Willes, J., said, 'It is a mistake to suppose that the provisions of the 14 & 15 Viet. c. 99, s. 14, are anything more than cumulative, or that they give a rule and the only rule of evidence.' See *R. v. Craddock*, 3 F. & F. 837. Where in an action for goods sold there was a plea of coverture, and the defendant stated that she was married to J. Lambert in 1844,

at a Roman Catholic chapel in George Street, Portman Square; that she and Lambert were both Roman Catholics, and were married by a priest in the way in which Roman Catholic marriages are ordinarily celebrated, and that they lived together for some years, and she produced a certificate of the marriage from the priest who performed the ceremony, and a certificate showing that the civil contract of marriage had been performed before the French Consul; but there was no proof that the person who performed the ceremony was a priest, or that the chapel was a place licensed for marriages, or that the registrar was present at the time; the Court of Common Pleas held that it might be presumed that the chapel was licensed and the registrar present, as well because the 6 & 7 Will. 4, c. 85, s. 39, declares, any person who wilfully solemnizes a marriage in any other place than a registered building or in the absence of the registrar, guilty of felony, as because the ordinary rule *omnia presumuntur rite esse acta* ought to prevail in such a case. *Sichel v. Lambert*, 15 C. B. (N. S.) 781. Where a marriage was solemnized in a building in a parish situate a few yards from the parish church, at a time when the parish church was disused in consequence of its undergoing repairs, and after divine service had been several times performed in such building, in the absence of any

Marriages celebrated in churches and chapels erected since the marriage Act, 26 Geo. 2, c. 33.

this marriage was proved by the registrar, who produced the certificate; it was objected that there was no proof of the second marriage, or that it was invalid, having taken place in an unlicensed chapel; but Wightman, J., overruled the objections. (*k*)

A marriage celebrated by banns, in a chapel erected after the 26 Geo. 2, c. 33, was passed, and not upon the site of any ancient church or chapel, was held to be void, although marriages had been *de facto* frequently celebrated there; the words of the statute 'in which chapel banns have been usually published' being held clearly to mean chapels existing at the time it was passed. (*l*) But as soon as this determination was known, the 21 Geo. 3, c. 53, was passed, making valid all marriages which *had been* celebrated in any parish church or public chapel, erected since the passing of the 26 Geo. 2, c. 33, and consecrated, and providing that the registers of such marriages should be received as evidence. The fourth section enacted, that the registers of marriages thereby made valid should, within twenty days after the 1st of August, 1781, be removed to the church of the parish in which such chapel should be situated; or, if it should be situated in an extra-parochial place, to the parish church next adjoining, to be kept with the registers of such parish. These provisions were extended by the 44 Geo. 3, c. 77, and the 48 Geo. 3, c. 127, to marriages celebrated in such chapels before the 23rd August, 1808; and the registers of such marriages are in like manner to be removed to parish churches, and transmitted to the bishop. The 6 Geo. 4, c. 92, recites, that since the 26 Geo. 2, c. 33, and the 44 Geo. 3, c. 77, divers churches and chapels had been erected in England, Wales, and Berwick-upon-Tweed, which had been duly consecrated, and divers marriages had been solemnized therein since the passing of the 44 Geo. 3, c. 77; but by reason that in such churches and chapels banns of matrimony had not usually been published, before or at the time of passing the 26 Geo. 2, c. 33, nor any authority obtained for solemnizing marriages therein, under the provisions of the 4 Geo. 4, c. 76, such marriages had been or might be deemed to be void; and then enacts, that all marriages already solemnized in any church or public chapel in England, Wales, and Berwick-upon-Tweed, erected since the 26 Geo. 2, c. 33, and consecrated, shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels, having chapelries annexed, and wherein banns had usually been published before or at the time of passing the 26 Geo. 2. By sec. 2, it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the 26 Geo. 2, c. 33, and consecrated, 'in which churches and chapels it has been customary and usual,

proof that the building was licensed by the bishop, it was presumed in favour of the marriage, to have been duly licensed. *R. v. Cresswell*, 45 L. J. M. C. 77; 13 Cox, C. C. 126, *et per* Lord Coleridge, C. J. We are of opinion that the marriage service having been performed in a place where divine service was several times performed, the rule "*omnia presumuntur rite acta*," applies, and that we must assume that the place was properly licensed, and that the clergymen, per-

forming the service was not guilty of the grave offence of marrying persons in an unlicensed place. The facts of the marriage and other church services being performed there by a clergyman are abundant evidence from which the court and a jury might assume that the place was properly licensed for the celebration of marriages.

(*k*) *Reg. v. Tilson*, 1 F. & F. 54.

(*l*) *Rex v. Northfield*, Dougl. 659.



before the passing of this Act, to solemnize marriages ;' and that all marriages hereinafter (*m*) solemnized therein shall be as good and valid as if they had been solemnized in parish churches, &c., wherein banns had usually been published before or at the time of passing the 26 Geo. 2. And the registers of marriages solemnized in the churches or chapels, by the 6 Geo. 4, enacted to be valid in law, or copies thereof, are to be received as evidence, in the same manner as the registers of marriages in parish churches, &c., in which banns were usually published before or at the time of the 26 Geo. 2, c. 33, or copies thereof, are received ; but liable to the same objections as would be available to exclude the latter from being received. (*n*) But such registers of marriages, solemnized in any public chapel, and made valid by the 6 Geo. 4, c. 92, are, within three months from the passing of the Act, to be removed to the parish church of the parish in which such chapel is situated ; and if it be situated in an extra-parochial place, then to the parish church next adjoining, to be kept with the marriage registers of such parish, and in like manner as parish registers are directed to be kept by the 26 Geo. 2. (*o*)

Where a marriage was solemnized in a chapel, before the 6 Geo. 4, c. 92, there must be some evidence given that banns were usually published there before the passing of the 26 Geo. 2, c. 33 ; but it was *prima facie* sufficient for that purpose to produce an old register of marriages solemnized in the chapel before that Act, and a regular register of banns published there since, and to prove that within the recollection of witnesses banns had been published and marriages solemnized in it from time to time of late years. (*p*) But where on an indictment for bigamy it appeared that the first marriage was celebrated at the chapel of Great Barr, which was a chapel in the parish of Aldridge, in the year 1843, and that marriages had been solemnized there for the last twenty years, but no register was produced, nor any further evidence given as to the celebration of marriages or publication of banns there ; Platt, B., held the evidence insufficient, as it was necessary to show either that the chapel was one in which banns had been usually published before the 26 Geo. 3, c. 33, or that the chapel was built and consecrated after that Act, and before the 6 Geo. 4, c. 92. (*q*)

By the 6 & 7 Vict. c. 37, s. 15, an Act to make better provision for the spiritual care of popular parishes, where any church or chapel has been consecrated as the church or chapel of any district constituted under the Act, such district is to be a new parish for ecclesiastical purposes, and 'it shall be lawful to publish banns of matrimony in such church, and according to the laws and canons in force in this realm to solemnize therein marriages ;' and the several laws relating to the publication of banns and the performance of marriages and the registering thereof, shall apply to the church of such new parish, and to the perpetual curate

Evidence of  
banns before  
the 26 Geo. 2,  
c. 33.

Marriages in  
district  
churches, &c.

(*m*) *Sic*, it should be 'hereafter.'

(*n*) 6 Geo. 4, c. 92, s. 3.

(*o*) *Id.* sec. 4.

(*p*) *Taunton v. Wyvorn*, 2 Campb. R. 297. This case was tried in 1809, after the passing of the 26 Geo. 3, and before

the 6 Geo. 4, c. 92.

(*q*) *Reg. v. Bowen*, 2 C. & K. 227, tried March 18, 1846. The 6 Geo. 4, c. 92, received the Royal Assent 5th July, 1825.

thereof. And by the 8 & 9 Vict. c. 70, s. 10, an Act for amending the Church building Acts, banns of marriage may be published and marriages performed in the church of every consolidated chapelry formed in the manner therein mentioned.

Marriages in  
certain chapels  
rendered valid.

The 7 & 8 Vict. c. 56, s. 3, reciting that by error banns have been published and marriages solemnized in chapels with districts assigned to them under the 59 Geo. 3, c. 134, 1 & 2 Will. 4, c. 38, 1 & 2 Vict. c. 107, and 3 & 4 Vict. c. 60, or some of them, but in which chapels banns could not be legally published nor marriages by law be solemnized, enacts that 'banns *already* (29th July, 1844) published and marriages *already* solemnized in such chapels as aforesaid shall not hereafter be questioned on account of the said banns having been published, or the said marriages solemnized in any such chapel as aforesaid, and the registers of all marriages so solemnized as aforesaid, or copies of such registers, shall be received in all courts of law and equity as evidence of such marriages respectively.' (r)

The 14 & 15 Vict. c. 97, s. 25, (rr) enacts that, where by error and without fraud banns had been published or marriages solemnized, in the church of any parish or district in which they could not lawfully be published or solemnized, the banns *already* (7th August, 1851) published and marriages *already* solemnized, shall not be questioned by reason thereof, except where some suit was pending.

The 24 & 25 Vict. c. 16, s. 4, renders valid all banns published and all marriages solemnized before the 17th of May, 1861, in churches and chapels which had been duly consecrated, but in which banns could not legally be published nor marriages by law be solemnized; but the Act is not prospective. (s)

The 18 & 19 Vict. c. 81, s. 13, renders valid marriages had before the 30th July, 1855, in any building registered under the 6 & 7 Will. 4, c. 85, but not certified as required by any Act.

(r) Sec. 1 provides that where a district has been or shall be assigned to any church or chapel under the 3 & 4 Vict. c. 60, the Church Building Commissioners or the bishop may determine as to banns and marriages in any such church or chapel; and sec. 2 enacts that when and so soon as it shall be determined that banns of matrimony may be published and marriages solemnized in any such church or chapel, the bishop of the diocese within which such church or chapel shall be locally situated, whether in any parish or extra-parochial place, or otherwise, shall certify the same, and such certificate shall be kept in the chest of the church or chapel with the books of registry thereof, and a copy thereof shall be entered in the books of the Registry of Banns and Marriages, and a duplicate of such certificate shall be registered in the registry of the diocese, and such certificate shall be deemed and taken to be conclusive evidence in all courts, and in all questions relating to any banns published or marriages solemnized in any such church or chapel, that the same might according to law respectively be published and solemnized in such church or chapel, and that all banns published

and marriages solemnized in any such church or chapel according to the laws and canons in force within this realm in that behalf shall, after the granting of such certificate, be good to all intents and purposes whatsoever: provided always, that no banns or marriages respectively published or solemnized according to the laws and canons in force within the realm in that behalf in any church or chapel in which the same are authorized to be respectively published, solemnized, and had by the said recited Acts or this Act, or either of them, shall be invalid by reason of any such certificate not having been duly given, or registered or entered, as hereinbefore required.

(rr) See 38 & 39 Vict. c. 66.

(s) The Act also indemnifies ministers who had solemnized any marriages in such churches and chapels, and makes the registers and copies of them admissible in evidence. Marriages in chapels, erected and consecrated since 26 Geo. 2, c. 33, were rendered valid by various other retrospective statutes; see 21 Geo. 3, c. 53; 44 Geo. 3, c. 77; 48 Geo. 3, c. 127; and see 6 Geo. 4, c. 92, noticed *ante*, p. 302.

The 4 Geo. 4, c. 76, and 6 & 7 Will. 4, c. 85, only extend to that part of the United Kingdom called England. (t) With respect to marriages in Scotland, though the point was formerly much doubted, (u) it appears to have been afterwards settled that where minors domiciled in England withdrew themselves into Scotland, or places beyond the seas, for the purpose of evading the Marriage Act, their marriage under such circumstances was nevertheless valid. (v) In one case, a writer to the signet proved that, according to the law of Scotland, marriage is a civil contract solemnly and deliberately entered into, and as if the parties had a serious intention of living together as man and wife. The assent of both parties must, therefore, be very distinctly and clearly proved to have been given, in order to render the contract a valid one. It is not necessary to the validity of such contract, that the parties should afterwards live together as man and wife; but the fact of their afterwards living together as man and wife will operate to explain ambiguous words, if there be such, in the contract itself. Where, therefore, the second marriage took place at Gretna Green, and upon the whole evidence the assent of the second wife was not 'distinctly and clearly proved,' and, though the parties had lived together afterwards, the evidence tended rather to show that they were living together in a state of concubinage, inasmuch as the prisoner still continued to address her by her maiden name, Alderson, B., directed the jury to find the prisoner not guilty. (w) And where, on an indictment for bigamy, to prove the second marriage in Scotland, a witness stated that she (being the sister of the second wife) was present at a ceremony performed by a minister of a congregation, but whether of the Kirk she did not know, in her private house in Edinburgh; that she herself was married in the same way, and that parties were always married in Scotland in private houses; that the prisoner and her sister lived together in her house as man and wife for a few days after the ceremony; and the jury found the prisoner guilty; upon the question being reserved whether the evidence was sufficient to justify the verdict, or whether some witness, conversant with the law of Scotland, should not have been called upon to say whether the facts proved constituted a valid marriage according to that law; it was held that some such witness ought to have been called, and that, even supposing that the witness had been a competent witness for such a matter, her evidence did not prove a marriage in fact. (x)

(t) See *ante*, pp. 278, 286.

(u) See Burn's Just. tit. *Marriage*, and the observations of Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1079.

(v) *Crompton v. Bearcroft*, Bull. N. P. 113; and see the opinion of Eyre, C. J., in reasoning upon the case of *Phillips v. Hunter*, 2 H. Blac. 412. And in *Ilderton v. Ilderton*, 2 H. Blac. 145, it was taken to be clear that a marriage, celebrated in Scotland, is such a marriage as would entitle the woman to her dower in England.

(w) *Graham's case*, 2 Lew. 97. In the same case the same learned judge refused to admit the certificate as evidence of the marriage.

(x) *Reg. v. Povey*, Dears. C. C. 32. 22 L. J. M. C. 19. The Court said that the *Sussex Peerage Case*, 11 Cl. & F. 85, had settled the point that a person not *peritus virtute officii* or *virtute professionis*, was inadmissible to prove the law of a foreign country, and had overruled *Reg. v. Dent*, 1 C. & K. 97; as to this see *post*, Evidence. See *Lapsley v. Grierson*, 1 H. L. C. 498, that illicit cohabitation in Scotland begun in the lifetime of a husband, and continued after his death, continues to bear an illicit character, unless there be a clear change in its character after the death of the husband is known to the parties.

Marriages in Scotland and places beyond the seas good, if performed according to the rites and customs of the country in which they were celebrated.

By the 19 & 20 Vict. c. 96, s. 1, 'after the 31st of December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgement, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, custom or usage to the contrary notwithstanding.

Marriage in  
St. Domingo.

Where a soldier on service with the British army in St. Domingo, in 1796, being desirous of marrying the widow of another soldier who had died there in the service, the parties went to a chapel in the town, and the ceremony was there performed by a person appearing and officiating as a priest; the service being in French, but interpreted into English by a person who officiated as clerk, and understood at the time by the woman to be the marriage service of the Church of England. This was held sufficient evidence, after eleven years' cohabitation, that the marriage was properly celebrated, although the woman stated that she did not know that the person officiating was a priest. Lord Ellenborough, C. J., in delivering his opinion, considered the case, first, as a marriage celebrated in a place where the law of England prevailed (supposing, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them), and held that it would be a good marriage by that law: for it would have been a good marriage in this country before the Marriage Act, and consequently would be so now in a foreign colony, to which that Act does not extend. In the second place, he considered it upon the supposition that the law of England had not been carried to St. Domingo by the king's forces, nor was obligatory upon them in this particular; and held that the facts stated would be evidence of a good marriage according to the law of that country, whatever it might be; and that upon such facts every presumption was to be made in favour of the validity of the marriage. (y)

Marriage by a  
clergyman of  
the Church of  
England in a  
private house  
in Ireland.

Where (before the 7 & 8 Vict. c. 81, *post*, p. 308) a person was married at her father's house, in Ireland, in 1799, in the presence of the friends of both families, by a clergyman of the Church of England, who had been curate of the parish for eighteen years; the parish church was standing, but persons of respectability were usually married at their own houses; the parties lived together for several years following as man and wife. Upon objection to the validity of this marriage, Best, C. J., said, I know of no law which says that celebration in a church is essential to the validity of a marriage in Ireland. The English Marriage Act does not apply, and I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this before the passing of that Act. *Dalrymple v. Dalrymple* (z) has placed it beyond a doubt that a marriage so celebrated as this has been would have been held valid in this country before the existence of that statute. (u) So where in support of a plea of coverture it was proved that Mrs. Quicke married Mr. Quicke at the house of the

(y) *Rex v. Brampton*, 10 East, 282.

(u) *Smith v. Maxwell*, R. & M. N. P. R.

(z) 2 Hagg. 54. Digitized by Microsoft

Rev. F. M'Guire, near Dublin, in 1842, and Mr. M'Guire's widow produced his letters of orders showing that he had been ordained deacon and priest by bishops of the Established Church, and also proved that when persons were married at their house, her husband always made an entry in a register book, which she produced, and also gave a certificate of the marriage to the persons married; and the register contained an entry of the marriage of Mr. and Mrs. Quicke, and Mrs. Quicke proved that she married Mr. Quicke as before mentioned, and produced the certificate given to her by Mr. M'Guire; Parke, B., held that the certificate was admissible as a part of the transaction; but not the register; and that the marriage was valid; for although it was not celebrated in a church, it was a valid marriage at common law before the 7 & 8 Vict. c. 81. (b)

Where a woman, being a Roman Catholic, and a man, being a Protestant, went in 1826 before Mr. Wood, a clergyman residing in Dublin, who, in his private house, read to them the marriage ceremony, and in the course of it asked her whether she would be the wife of the man, and asked him whether he would be her husband, to which question both of them answered, 'I will.' Wood was reputed to be a clergyman of the Established Church, and a document purporting to be letters of orders signed and sealed by W. late Archbishop of Tuam, dated in 1799, whereby the archbishop certified that he had ordained Wood a priest, and which letters were found among Wood's papers at the time of his death in July 1829, was admitted without proof of the handwriting or seal of the archbishop as being more than thirty years old. It was held that this document was properly received in evidence, being above thirty years old: if it had been only signed there could have been no question as to its admissibility, but it was, in fact, also sealed; but although an archbishop is a corporation sole for many purposes, yet such a certificate has no relation to his corporate character, and the seal must be considered as the seal of the natural person, and not of the corporation; and consequently that there was sufficient evidence of the marriage. (c)

In a case before the 7 & 8 Vict. c. 81, *post*, p. 308, at the Old Bailey, a question was made, whether a marriage of a dissenter in Ireland, when performed by a dissenting minister in a private room, was valid. It was contended, on behalf of the prisoner, who was indicted for bigamy, that the marriage was illegal from the clandestine manner in which it was celebrated; and several Irish statutes were cited, from which it was argued that the marriage of dissenters in Ireland ought at least to be in the face of the congregation, and not in a private room. But the recorder is said to have been clearly of opinion that this marriage was valid, on the ground that as, before the Marriage Act, a marriage might have been celebrated in England in a house, and it was only made necessary, by the enactment of positive law, to celebrate it in a church, some law should be shown requiring dissenters to be married in a church, or in the face of the congregation, in Ireland, before this marriage could be pronounced to be illegal: whereas one of the Irish statutes, 21 & 22 Geo. 3, c. 25, (d) enacted, that all marriages

Marriage by a dissenting minister in a private room in Ireland.

(b) *Stockbridge v. Quicke*, 3 C. & K. 305.

(d) And see 11 Geo. 2, c. 10. By 32 Geo. 3, c. 21, s. 12, Protestants may be married to Roman Catholics by clergy.

(c) *Rex v. Bathwick*, 2 B. & Ad. 689.

Statutes as to  
marriages in  
Ireland.

between Protestant dissenters, celebrated by a Protestant dissenting teacher, should be good, without saying at what place they should be celebrated. (e)

The 7 & 8 Vict. c. 81, (f) amends the law of marriages in Ireland. Under this Act under certain circumstances a marriage may be solemnized in certain registered places of public worship and before a registrar.

Sect. 4 provides that marriages between parties, both or either of whom are Presbyterians, may be solemnized, according to the forms used by Presbyterians, in certified meeting houses. (g)

Sect. 32. 'And be it enacted, that after any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the actual dwelling of either of the parties previous to the marriage, within the district or presbytery (as the case may be), wherein such marriage was solemnized, for the time required by this Act, or of the consent of any person whose consent thereunto is required by law; and where a marriage shall have been solemnized in a certified Presbyterian meeting house, it shall not be necessary to prove that either of the parties was a Presbyterian, or, if the marriage was by license, that the certificate required to be delivered to the minister granting such license had been so delivered, or, where the marriage was by banns, that a certificate of the publication of banns had been produced to the minister by whom the marriage was solemnized, in cases where such production is required by this Act; nor shall any evidence be given to prove the contrary of any of these several particulars in any suit touching the validity of such marriage, or in which such marriage shall be questioned.'

Sec. 49. 'And be it enacted, that except in the case of marriages

men of the Established Church; but sec. 13 contains a proviso that the Act shall not authorise Protestant dissenting ministers or Popish priests to celebrate marriage between Protestants of the *Established Church* and Roman Catholics. The clause, however, does not enact that such a marriage celebrated by a Protestant dissenting teacher shall be void. Such a marriage, celebrated by a *Popish priest*, would have been void by 19 Geo. 2, c. 13 (Irish); and the 33 Geo. 3, c. 21, s. 12, only authorises Popish priests to celebrate marriage between a Protestant and a Papist, where such Protestant and Papist have been first married by a Protestant clergyman. See the 3 & 4 Will. 4, c. 103, which repeals the penal enactments made by 6 Ann. (1.), 12 Geo. 1 (1.), 23 Geo. 2 (1.), 12 Geo. 3 (1.), 33 Geo. 3 (1.), against Catholic clergymen celebrating marriages between Protestants in Ireland, and see now the 33 & 34 Vict. c. 110, s. 39 (Irish), *post*, p. 310.

(e) *Rex v. —*, Old Bailey, Jan. Sess. 1815, *cor.* Sir J. Silvester, Recorder. MS. The prisoner was an officer in the army; and his first marriage upon which this question was raised, took place in 1787, at Londonderry. The second marriage was celebrated in London, according to the ceremonies of the Church of

England.

(f) This Act was passed 9th August, 1844, and is amended by 9 & 10 Vict. c. 72, 26 & 27 Vict. c. 27, 33 & 34 Vict. c. 110, 34 & 35 Vict. c. 49, 36 Vict. c. 16, 37 & 38 Vict. c. 96. See 26 & 27 Vict. c. 90.

(g) We have seen that a marriage before this Act by a Presbyterian minister in Ireland was held void. *R. v. Millis, ante*, p. 299. But the 5 & 6 Vict. c. 113, s. 1, renders all marriages celebrated in Ireland before the 12th August, 1842, by Presbyterian or other Protestant ministers or teachers, or those who at the time of such marriages had been such, of the same force as if they had been celebrated by clergymen of the united Church of England and Ireland. The 6 & 7 Vict. c. 39, renders all similar marriages after the passing of the preceding Act, and before the passing of that Act, 28th July, 1843, valid. And the 7 & 8 Vict. c. 81, s. 83, contains a similar provision as to such marriages between the passing of the preceding Act and that Act. Sec. 2 of 5 & 6 Vict. c. 113, excepts marriages previously adjudged invalid; marriages where either of the parties had contracted another lawful marriage; and marriages respecting which prosecutions were pending when the Act passed, 12th August, 1842.

by Roman Catholic priests, which may now be lawfully celebrated, if any person shall knowingly and wilfully intermarry after the said thirty-first day of March, in any place other than the church or chapel or certified Presbyterian meeting house, in which banns of matrimony between the parties shall have been duly and lawfully published, or specified in the license, where the marriage is by license, or the church, chapel, registered building or office, specified in the notice and registrar's certificate or license as aforesaid, or without due notice to the registrar, or without certificate of notice duly issued, or without license from the registrar, in case such notice or license is necessary under this Act, or in the absence of a registrar where the presence of a registrar is necessary under this Act, or if any person shall knowingly or wilfully, after the said thirty-first day of March, intermarry in any certified Presbyterian meeting house without publication of banns, or any license, the marriage of all such persons, except in any case hereinbefore excepted, shall be null and void.

The 33 & 34 Vict. c. 110 (amended by 34 & 35 Vict. c. 49), also amends the law relating to marriages in Ireland. This Act contains provisions as to the churches in which marriages may be celebrated, and as to licenses for marriages.

By sec. 38, a marriage may, notwithstanding anything to the contrary hereinbefore in this Act contained, be lawfully solemnized by a Protestant Episcopalian clergyman between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, and by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, provided the following conditions are complied with :—

- 1st. That such notice is given to the registrar, and such certificate is issued as at the time of the passing of this Act is required by the 7 & 8 Vict. c. 81, as amended by the 26 Vict. c. 27, in every case of marriage intended to be solemnized in Ireland according to the rites of the united church of England and Ireland, with the exception of marriages by license or special license, or after publication of banns.
- 2nd. That the certificate of the registrar is delivered to the clergyman solemnizing such marriage at the time of the solemnization of the marriage.
- 3rd. That such marriage is solemnized in a building set apart for the celebration of divine service, according to the rites and ceremonies of the religion of the clergyman solemnizing such marriage, and situate in the district of the registrar by whom the certificate is issued.
- 4th. With open doors.
- 5th. That such marriage is solemnized between the hours of eight in the forenoon and two in the afternoon, in the presence of two or more credible witnesses.

Sec. 39. 'There shall be repealed so much of an Act of the Parliament of Ireland, passed in the nineteenth year of the reign of King George the second, chapter thirteen, as provides that a marriage between a Papist and any person who hath been or hath

professed himself or herself to be a Protestant at any time within twelve months before such celebration of marriage, if celebrated by a Popish priest, is to be void; but any marriage solemnized by a Protestant Episcopalian clergyman, between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, or by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, shall be void to all intents in cases where the parties to such marriage knowingly and wilfully intermarried without due notice to the registrar, or without certificate of notice duly issued, or without the presence of two or more credible witnesses, or in a building not set apart for the celebration of divine service, according to the rites and ceremonies of the religion of the clergyman solemnizing such marriage.

By 34 & 35 Vict. c. 49, s. 27, whenever a license for the marriage of a Roman Catholic with a person not a Roman Catholic shall have been issued, pursuant to ss. 25 or 26 of this Act, such marriage may lawfully be solemnized by a Roman Catholic clergyman between such persons. (*h*)

Marriage of minors in Ireland.

A marriage by license, in Ireland, where one of the parties was under age at the time, and there was no consent of the father, was not absolutely void, but only voidable within one year, under the 9 Geo. 2, c. 11, and if no proceedings were taken within the year to avoid the marriage, it was binding, and the party, if he married again (during the life of his wife) might be properly convicted of bigamy. (*i*)

A marriage between Protestants by a Catholic priest is still void.

A marriage, however, celebrated by a Roman Catholic priest between two Protestants is still illegal, and renders the person celebrating it liable to be indicted for felony. (*j*)

4 Geo. 4, c. 91, makes valid certain marriages solemnized in the chapel, &c., of a British minister, or of a British factory, or in the army broad.

The 4 Geo. 4, c. 91, recites the expediency of relieving the minds of all his Majesty's subjects from any doubt concerning the validity of marriages, solemnized by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person, officiating under the orders of the commanding officer of a British army serving abroad: and then enacts, that 'all such marriages shall be deemed and held to be as valid in law as if the same had been solemnized within his Majesty's dominions, with a due observance of all forms required by law.' But there is a proviso that this Act shall not confirm, or impair, or affect the validity of any marriages solemnized beyond the seas, save and except such as are solemnized as herein specified and recited. (*k*)

(*h*) Before these Acts a marriage celebrated in Ireland between a Roman Catholic and a Protestant by a Roman Catholic priest was void. *Sunderland's case*, 1 Lew. 109; *R. v. Orgill*, 9 C. & P. 80, *Swift v. Swift*, 3 Knapp, 303, *Yelverton v. Yelverton*, House of Lords, per Lord Wensleydale.

(*i*) *Rex v. Jacobs*, R. & M. C. C. R. 140. But since the 7 & 8 Vict. c. 81, s. 32, proof of the consent of parents, &c., is unnecessary.

(*j*) See *R. v. Taggart*, 2 Cox, C. C. 50.

(*k*) Sec. 2. This Act renders the marriage valid, though one party be not



The 12 & 13 Vict. c. 68, which passed on the 28th of July, 1849, renders valid, 'all marriages (both or one of the parties thereto being subjects or a subject of this realm) which shall be solemnized in the manner in that Act provided in any foreign country or place where there shall be a British consul duly authorized to act in such foreign country or place under that Act,' and contains many provisions as to the manner of performing such marriages before British consuls. (*l*)

Marriages abroad before British consuls according to the 12 & 13 Vict. c. 68, to be valid.

The 31 & 32 Vict. c. 61 (which was passed on the 16th July, 1868), recites this Act, and that marriages have been from time to time solemnized at certain places in China and elsewhere between persons, being both or one of them subjects or a subject of this realm, by persons acting temporarily as consuls in such places; and that 'doubts are entertained as to the validity of the said marriages, owing to a question having arisen whether the persons by whom the same were solemnized were duly authorized in that behalf, and it is expedient to remove such doubts as to the said marriages, and as to any marriages which may be celebrated in like manner after the passing of this Act.'

Sec. 1. 'This Act may be cited for all purposes as the Consular Marriage Act, 1868.'

Sec. 2. 'All marriages solemnized before the passing of this Act (both or one of the parties thereto being subjects or a subject of this realm) by or in the presence of any person acting or purporting to act in the place of a British consul, such consul being duly authorized to solemnize and register marriages according to the provisions of the said recited Act, shall be as valid in law as if the same had been solemnized by or in the presence of such British consul.'

Sec. 3. 'From and after the passing of this Act, every person acting or legally authorized to act in the place of a British consul, such consul being duly authorized to solemnize and register marriages between persons (both or one of them being a subject or subjects of this realm), shall be deemed to be a British consul duly authorized for all the purposes of the said recited Act.'

By 28 & 29 Vict. c. 64, after reciting that laws "have from time to time been made by the legislature of divers of her Majesty's possessions abroad for the purpose of establishing the validity of certain marriages previously contracted therein, but doubts are entertained whether such laws are in all respects effectual for the aforesaid purpose beyond the limits of such possessions," it is enacted as follows:—

Laws made in the Queen's possessions abroad for legalizing marriages.

Sec. 1. 'Every law made or to be made by the legislature of any such possession as aforesaid, for the purpose of establishing the validity of any marriage or marriages contracted in such possession, shall have and be deemed to have had from the date of the making of such law, the same force and effect, for the purpose aforesaid, within all parts of her Majesty's dominions, as such law may have had, or may hereafter have, within the possession for which the same was made: provided that nothing in this law con-

a British subject. *Re Wright*, 2 K. & J. 595; 25 L. J. Ch. 621.

*ante*, p. 300. By s. 13, after the marriage, proof of residence and consent of necessary parties is dispensed with, and negative evidence is excluded.

(*l*) This Act was probably passed in consequence of *Catherwood v. Cuslon*,

tained shall give any effect or validity to any marriage, unless at the time of such marriage both of the parties thereto were, according to the law of England, competent to contract the same.'

Sec. 2. 'In this Act the word "legislature" shall include any authority competent to make laws for any of her Majesty's possession abroad, except the Parliament of the United Kingdom and her Majesty in Council.'

In Mexico,  
Moscow,  
Tahiti,  
Ningpo,  
Lisbon, and  
the Ionian  
Islands.

Certain marriages of British subjects are legalized in Mexico by the 17 & 18 Vict. c. 88; in Moscow, Tahiti, and Ningpo by the 21 & 22 Vict. c. 46; at Lisbon, by the 22 & 23 Vict. c. 64; in the Ionian Islands by the 23 & 24 Vict. c. 86; (*ll*) at Morro Velho, in the empire of Brazil, by the 30 & 31 Vict. c. 93; and provision is made for the transmission to the registrar general of certificates of these marriages, &c.

Certain marriages in Odessa are legalized by the 30 & 31 Vict. c. 2; and see as to China, 31 & 32 Vict. c. 61.

India.

The 58 Geo. 3, c. 84, renders marriages solemnized in India by ministers of the Church of Scotland before the 31st December, 1818, valid; and the 14 & 15 Vict. c. 40, (*m*) regulates marriages in India after the 1st January, 1852, or such other day as the Governor General shall direct, where one or both of the parties is or are a person or persons professing the Christian religion.

Marriages in  
Newfound-  
land.

Marriages in the colony and dependencies of Newfoundland were for some time regulated by the statute 5 Geo. 4, c. 68, which repealed a former statute, 57 Geo. 3, c. 51, upon the same subject. The 5 Geo. 4, c. 68, with the exception of a proviso in sec. 1, relating to marriages which had taken place before the 25th March, 1825, is repealed by the 36 & 37 Vic. c. 91.

Quakers' mar-  
riage, how  
proved.

In an action for criminal conversation the marriage of the plaintiff and his wife, who were both Quakers, had been performed according to the ceremonies of the sect, by a public declaration of the parties at a monthly meeting of the society, of their becoming man and wife, and a certificate to that effect entered in a register, signed by the parties and by several subscribing witnesses. The register was produced and proved by one of the witnesses, and a member of the society proved the forms observed to be those usually considered as necessary to marriage among Quakers. (*mm*)

Jewish mar-  
riages.

Where two witnesses were called, who swore that they were present in the Jewish synagogue when a marriage took place, it was insisted that what took place in the synagogue was merely a ratification of a previous written contract, and as that contract was essential to the validity of the marriage, it ought to be produced and proved; and the contract, in the Hebrew tongue, was accordingly put in and proved. (*n*) So a Jewish divorce can only be proved by producing the document of divorce delivered by the husband to the wife. (*nn*)

Jewish  
divorce.

(*ll*) This Act is repealed by 27 & 28 Vict. c. 77, s. 4. This latter Act contains provisions as to marriages in the Ionian Islands, and makes certain documents evidence.

(*m*) This Act is repealed by the statute law Revision Act, 1875, 37 & 38 Vict.

c. 66, passed 11th August, 1875.

(*mm*) *Deane v. Thomas*, M. & M. 361. See the 11 & 12 Vict. c. 58, 23 & 24 Vict. c. 18; 32 Vict. c. 10, *ante*, pp. 279 293.

(*n*) *Horn v. Noel*, 1 Camp. 61.

(*nn*) *Lacon v. Higgins*, 3 Stark. N. P.

The law of France as to marriage may be proved by the production of a book, purporting to contain the code of France, and proved by oral testimony of a witness acquainted with the law of France, to contain the law of France. The articles of the law of France, which prescribe the forms essential to marriage, do not declare a marriage void for nonobservance of those forms, but parol evidence is admissible to show that, by the law of France, a marriage in fact, without observance of the requisites prescribed by the articles, is void. (*o*)

French marriages.

It was formerly held that if an idiot contracted matrimony, it was good and should bind him : but modern resolutions appear to have proceeded upon the more reasonable doctrine of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, is absolutely void. And as it might be difficult to prove the exact state of the mind of the party at the actual celebration of the nuptials, the 15 Geo. 2, c. 30, has provided that if persons found lunatics under a commission, or committed to the care of trustees by any Act of Parliament, marry before they are declared of sound mind by the Lord Chancellor, or the majority of such trustees, the marriage shall be totally void. (*p*)

The marriage of lunatics void.

Upon indictments for bigamy it is not sufficient to prove a first marriage by cohabitation and reputation ; but it is necessary to prove what the courts call a marriage in fact, that is, an actual marriage. (*q*) The 4 Geo. 4, c. 76, s. 28, requires that marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and the 6 & 7 Will. 4, c. 86, s. 31, that it shall be registered in duplicate according to the form in the schedule, and that each entry shall be signed by the minister and parties married, and attested by two witnesses. But, upon a provision nearly similar in the former Marriage Act, it was held not to be necessary to call one of the subscribing witnesses to the register in order to prove the identity of the persons married ; but that the register, or the copy of it, being produced, any evidence which satisfied the jury as to the identity of the parties was sufficient : as if their handwriting to the register were proved ; or that bell-ringers were paid by them for ringing for the wedding, or the like. (*r*) The prisoner was indicted for marrying Ann Epton, whilst Jane, his former wife, was living ; each marriage was proved by a witness who was present at the ceremony ; and it appeared that at the first marriage the prisoner went by the name of Allison, and at the second by the name of Wilkinson. Chambre, J., doubted whether the evidence was sufficient without proof of the banns ; but the judges held that it was. (*rr*)

Marriage by reputation not sufficient against a prisoner.

Evidence of identity, &c.

Upon an indictment for bigamy it was proved on the part of the prisoner that her first husband, before he married her, had been in Canada, and that he was absent for about two years, and when he returned he said he had brought his wife with him, and a lady

178, and *qu.*, whether such a divorce would be any defence to an indictment for bigamy. See the learned note of the reporters, *ibid.*

(*o*) *Moss v. Smith*, 1 Man. & Gr. 228.

(*p*) 1 Blac. Com. 438, 432.

(*q*) *Catherwood v. Caslon*, 13 M. & W.

261.

(*r*) 1 East, P. C. c. 12, s. 11, p. 472. Bull. N. P. 27. See *Morris v. Miller*, 4 Burr. 2057. *Birt v. Barlow*, Dougl.

162.

(*rr*) *Ex v. Allison*, MS. Bayley, J., and K. & R. 109.

accompanied him, whom he treated as his wife, and every one else regarded her in that capacity; she had been heard of as being alive after the prisoner's first marriage; and thereupon Crompton, J., interposed, and said that there was evidence of a prior marriage, and, although there might be some technical difficulty in proving the marriage in Canada, still if there was reasonable doubt of the fact, the prisoner ought to be acquitted, and the jury said it was unnecessary to hear any more evidence. (s)

In one case it was ruled, that if A. takes B. to husband in Holland, and then, in Holland, takes C. to husband living B., and then B. dies, and then A. living C. marries D., this is not marrying a second husband, the former being alive; the marriage to C. living B. being simply void. But if B. had been living, it would have been felony to have married D. in England. (ss)

The prisoner was indicted for marrying E. Chant, widow, E. Rowe, his wife, being then alive; it appeared that E. Chant was, in fact and by reputation, a single woman; it was objected that she was improperly described in the indictment as a widow, and upon a case reserved the judges were unanimously of opinion that the misdescription was fatal, though it was not necessary to have stated more than the name of the party. (t) So where, on an indictment for bigamy describing the first wife as Ann Gooding, an examined copy of the certificate (u) of the marriage of the prisoner and Sarah Ann Gooding was put in, and there was no evidence to explain the difference in the names: Maule, J., directed an acquittal. (v)

On an indictment for bigamy a photograph which had been taken from the prisoner, and which she had said was that of her husband, was allowed to be shown to a witness present at the first marriage, and also to another witness who had known the man of whom the photograph was a likeness, in order to prove his identity with the person mentioned in the marriage certificate. (y)

The 6 & 7 Will. 4, c. 86 (an Act for registering births, marriages, and deaths in England), by sec. 38, enacts that all certified copies of entries purporting to be sealed or stamped with the seal of the register-office, shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office shall be of any force or effect, which is not sealed or stamped as aforesaid. (z)

In one case it was held that proof of the prisoner's cohabiting with and acknowledging himself married to a former wife then living, such assertion being backed by his producing to the witness a copy of a proceeding in a Scotch court against him and his wife

(s) *Reg. v. Wilson*, 3 F. & F. 119. See *Hamblin v. Shelton*, 3 F. & F. 133; and *Doc d. Fleming v. Fleming*, 4 Bing. R. 266, for similar evidence in civil cases.

(ss) *Lady Madison's case*, 1 Hale, 693.

(t) *Rex v. Deeley*, R. & M. C. C. R. 303. S. C. 4 C. & P. 579. But such a variance may be amended under the 14 & 15 Vict. c. 100, s. 1. See vol. 1, p. 52.

(u) *Quere*, Register.

(v) *Reg. v. Gooding*, C. & M. 297.

Maule, J. thought that 'evidence might perhaps be offered to explain the circumstance of this difference in the name of the prisoner's first wife, as she is described in the indictment, and as described in the marriage certificate; and even in the absence of such evidence, proof might be supplied that the woman was known by both names.'

(y) *R. v. Tolson*, 4 F. & F. 103.

(z) See also the 3 & 4 Vict. c. 92, 21 & 22 Vict. c. 25. See *post*, Evidence.

Copies of entries in registers evidence, if sealed with seal of register office.

How far the acknowledgment of the defendant is sufficient evidence.

for having contracted the marriage improperly (the marriage, however being still good according to that law) was sufficient evidence of the first marriage. The point being reserved, all the judges who were present held the conviction proper. Two of them observed that this did not rest upon cohabitation and bare acknowledgment, for the defendant had backed his assertion by the production of the copy of the proceeding; but some of the judges thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment. (a) So where it was proved that the prisoner being charged with bigamy made a statement before a justice, in which he expressly declared that he had married his first wife, who was then present; Erskine, J., left the case to the jury, observing, that this was not an incautious statement made without due attention, but that the prisoner's mind was directed to the very point by the charge made against him. (aa)

So where upon an indictment for bigamy it appeared that the prisoner returned from America with a woman described in the indictment as Mary Carlisle, with whom he lived as his wife for some years afterwards; and that soon after his return he told her sister that he had been married to Mary Carlisle at New York by a Presbyterian minister, and he subsequently caused the bellman at Oldham to give public notice, which he did, that no one was to give credit to 'Mary, the wife of John Newton;' and some time afterwards Mary Newton, describing herself as his wife, complained to a magistrate of his having ill-treated her, and the prisoner attended before the magistrate, and did not deny the alleged marriage, but said he could no longer live with her on account of her jealousy, and consented to allow her eight shillings a week; Wightman, J., after consulting Cresswell, J., told the jury that the question was, whether they were satisfied by the statements made by the prisoner on the various occasions referred to that he had been married to Mary Carlisle in America, and that such marriage was a valid one according to the law of that country. The jury were to say whether, as against the prisoner, it might not be taken, on the faith of his own repeated declarations, that the marriage had been a valid one according to the law in force at New York. That declarations lightly or hastily made were entitled to very little weight in such a case; but what the prisoner said deliberately, and when it was obviously his interest to deny marriage, if he did not know it to be a valid one, was undoubtedly evidence entitled to the very serious consideration of the jury. (b)

After proof of the first marriage the second wife may be a wit-

The prisoner's declarations deliberately made of a prior marriage in a foreign country are evidence of a legal marriage there.

The true wife

(a) Truman's case, Nottingham Spr. Assizes, 1795, decided upon by the judges in East. T. 1795, MS. Ind. 1 East, P. C. c. 12, s. 10, pp. 470, 471; where see some remarks as to the admission of a bare acknowledgment in evidence in a case of this nature. An admission or statement made by a prisoner is evidence against him, though it may under circumstances be entitled to little or no weight.

(aa) Rex v. Dennis Upton, Gloucester Spr. Ass. 1839. R. v. Flaherty, 2 C. & K. 782. See Dickinson v. Coward, 1 B. & A. 679, per Lord Ellenborough, C. J. See also 2 Stark. Evid. 251, 2nd edit.

(b) Reg. v. Newton, 2 M. & Rob. 503. S. C. as Reg. v. Simmonsto, 1 C. & K. 164. See R. v. Savage, 13 Cox, C. C. 178, where it seems Lush J., refused to act on R. v. Newton.

cannot be a witness.

ness ; but it is clear that the first and true wife cannot be admitted to give evidence against her husband. (c)

The prisoner was indicted for having married A. Walker, his first wife, A. Armstrong, being alive : the prisoner's first marriage with A. Armstrong was proved. The prisoner's defence was, that the first marriage was void, as A. Armstrong had a husband living at the time, and he proposed to call A. Armstrong to prove that fact ; it was objected to her competency, that the fact of her marriage with the prisoner having been proved, she must be taken to be his lawful wife. Alderson, B., was at first inclined to think that she might be examined simply to the fact of her being the wife or not of the prisoner ; but after conferring with Williams, J., he determined not to receive her evidence, but to reserve the point. (d) But where a woman, called as a witness against a prisoner, proved on the *voire dire* that she married the prisoner in 1849, Erle, J., held that she might also prove on the *voire dire* that she had a sister seven years older than herself, and that they had been brought up together with their parents, and that she always believed that they were sisters, and that her sister had married the prisoner in 1846, and died in 1848 ; for if a person is questioned on the *voire dire* with the view to raise an objection to her competency, she may also be examined to remove that *prima facie* ground of objection. (e)

Letters.

A daughter wrote to her father in America, and in about two months afterwards received a letter in reply in his handwriting, dated the 31st of May, 1836 ; it was held that, this was evidence that he was then alive. (f)

(c) 1 Hale, 693. 1 East, P. C. c. 12, s. 9, p. 469, and 1 Hawk, c. 42, s. 8, where it is said that this rule has been so strictly taken that even an affidavit to postpone the trial made by the first wife has been rejected, and Old Bailey, Feb. Sess. 1786, is cited.

(d) Peat's case. 2 Lewin, 288. The prisoner was acquitted. The first impression of the very learned Baron seems to have been the correct one. The only ground on which the witness could be rejected was, that she was the lawful wife of the prisoner ; for 'the general rule does not extend to a wife *de facto*, but not *de jure*.' 2 Stark. Evid. 432, (2nd edit.). In Wells v. Fletcher, 5 C. & P. 12. S. C. 1 M. & Roh. 99, a woman called for the defendant on examination on the *voire dire*, said she had been married to the plaintiff, and on re-examination that she was married to another person previously ; but, not seeing him for thirty years, she thought he was dead, and therefore married the plaintiff, but afterwards found that her first husband was living ; and Patteson, J., held that the witness was competent, as the second marriage was a nullity. If Peat's case had been an indictment for larceny, and the witness called for the prisoner had proved her marriage to him on the *voire dire*, Wells v. Fletcher shows that she might have been rendered competent by proving her previous marriage, and it is difficult to see how proof by other evi-

dence that she had married the prisoner, whether such evidence was given before or after she was called, could render her incompetent ; for her evidence would not be inconsistent with such evidence, as it would admit the marriage with the prisoner, but show that it was void. Rex v. Bathwick, 2 B. & Ad. 639, shows that the competency of the wife does not depend upon the marshalling of the evidence, or the particular stage of the case in which she may be called ; if, therefore, in Peat's case the witness had been called before her marriage with the prisoner had been proved, and she would have been competent to prove her previous marriage, it is difficult to see how her marriage with the prisoner having been proved before she was called could render her incompetent, and it certainly would operate hardly on a prisoner, if such were the case, for the prosecutor might in the course of his case prove the marriage of the witness with the prisoner, and the prisoner might have no one except the witness to prove the former marriage. It may be added that Lord Hale, vol. 1, p. 693, says that a second wife is not so much as a wife *de facto*. C. S. G.

(e) Reg. v. Young, 5 Cox, C. C. 296.

(f) Reed v. Norman, 8 C. & P. 65. Lord Denman, C. J. ; his lordship held in the same case, that the post mark was evidence that the letter was put into the post, but that the letter might have been

An indictment for bigamy under the 35 Geo. 3, c. 57, s. 1 (now repealed), alleging that the prisoner married A., and afterwards feloniously married C., 'the said A., his former wife, being then alive,' sufficiently charged the offence, without also alleging that the prisoner was still married to A., when he married C.; for a divorce from A. was not to be presumed. (*g*)

written at any time, and therefore proof was given that it was in reply to the daughter's letter; but this seems to have been unnecessary, for the date is *prima facie* evidence of the time when an instrument is written. *Rex v. Harborne*. *Sinclair v. Baggaley*, 4 M. & W. 313. *Hunt*

*v. Massey*, 5 B. & Ad. 903. *Potez v. Glossop*, 2 Exch. R. 191. *Anderson v. Weston*, 6 B. N. C. 296. *Morgan v. Whitmore*, 6 Exch. 716.

(*g*) *Murray v. The Queen*, 7 Q. B. 700. *Reg. v. Apley*, 1 Cox, C. C. 71.

Form of indictment.

## BOOK THE SIXTH.

## OF EVIDENCE.

## CHAPTER THE FIRST.

OF WHAT NATURE EVIDENCE MUST BE.—OF PRESUMPTIVE EVIDENCE, p. 320.—ON THE RULE THAT THE BEST POSSIBLE EVIDENCE MUST BE PRODUCED, p. 327—AND OF HEARSAY EVIDENCE, p. 349.

BEFORE entering upon the subject of Presumptive Evidence, to which the following section will be appropriated, it may be proper to pay attention to a few points applicable to the law of evidence in criminal prosecutions generally.

Rules of evidence the same in criminal as civil cases.

There is in general no difference as to the rules of evidence between criminal and civil cases. What may be received in the one case may be received in the other, and what is rejected in the one ought to be rejected in the other. (a) A fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence. (b)

Bill of exceptions to evidence.  
Case reserved.

It has been doubted whether a bill of exceptions lies in any criminal case. (c) It seems now to be settled that it does not. (d) If the judge who presided at the trial was of opinion that there was a doubt whether he might not have admitted some evidence or witness improperly, or whether the facts proved constituted the crime charged, he might formerly, in his discretion, forbear to pass sentence, or respite the judgment, until the opinions of the fifteen judges were obtained upon a case reserved. And now by the 11 & 12 Vict. c. 78 (e), when any person is convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case is tried, may, in his or their discretion, reserve any question of law, which has arisen on the trial (f) for the consideration of the court consti-

(a) By Abbott, J., in *Rex v. Watson*, 2 Stark. R. 155.

(b) Lord Melville's case, 29 How. St. Tr. 763.

(c) Sir H. Vane's case, 1 Lev. 68. S. C. Kel. 15. 1 Sid. 85. Hawk. P. C. b. 2, c. 46, s. 210. *Rex v. Lord Paget* and others, 1 Leon. 5. *Rex v. Nutt*, 1 Barnardist. 307. 2 Phil. Ev. 465. *Rex v. Inhabitants of Brixton*, 1 Camp.

Hardw. 249.

(d) *Reg. v. Rice*, 2 Cox, C. C. 118; *R. v. Jelly*, 10 Cox, C. C. 553; *Reg. v. Esdaile*, 1 F. & F. 213. Lord Campbell, C. J. *Reg. v. Alleyne*, Dears. C. C. 505. Arch. C. P. 149. *Reg. v. Brown*, Arch. C. P. 149.

(e) See the Appendix of Statutes, viii.

(f) If prisoner pleads guilty, no question can be reserved under this Act, *R. v.*



tuted by that Act, and forbear to pass sentence, or respite the judgment until such question is decided. (g) If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, such a conviction ought not, it seems, to be set aside because some other evidence was given which ought not to have been received; (h) but if the case without such improper evidence were not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. (i)

Where the defendant has been convicted on an indictment for a misdemeanor, removed into the Court of Queen's Bench by a writ of *certiorari*, a new trial may be granted, at the instance of the defendant, where the justice of the case requires it. (j) Where several defendants are tried at the same time for a misdemeanor thus removed, and some are acquitted and others convicted, the Court of Queen's Bench may grant a new trial as to those convicted, if they think the conviction improper. (k) And it is a rule that where there is only one defendant, he must be present in court when a motion is made for a new trial. (l) And where several defendants are convicted upon an indictment for a misdemeanor thus removed into the Court of Queen's Bench, all must be present in court when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance. (m) But where a defendant has been found guilty of an offence, e. g. a nuisance, for which he is not liable to *personal punishment*, but only to a fine, it is not necessary that he should be present in court when a motion is made for a new trial. (n) Whenever it is necessary for a defendant to be present, if he be already in custody, he must obtain a *habeas corpus* to bring him into court. (o) The presence of the defendant is not necessary on the argument of a special verdict, as the presumption of innocence may be supposed to continue. (oo) As a general rule, no new trial can be had where the defendant is acquitted, although the acquittal was founded on the misdirection of the judge; (p) or where a verdict is found for a defendant on a plea of *autrefois acquit*, although that raises a

New trial when indictment for misdemeanor removed into Queen's Bench.

After an acquittal.

Clark, L. R. 1 C. C. R. 54, 36 L. J. M. C. 16; 10 Cox, C. C. 338.

(g) See the rules issued by the judges as to such cases reserved in 1 Den. C. C. ix.

(h) But see the more correct account of *Rex v. Tinkler*, on which *Rex v. Ball*, *infra*, is reported to have been rested, in 1 Den. C. C. iv., and Lord Denman's notes, *ibid*.

(i) *Rex v. Ball*, R. & R. 132. *Rex v. Oldroyd*, *ibid*. 88; but see *Rex v. Harling*, R. & M. C. C. R. 39. See 36 & 37 Vict. c. 66, sched. R. 48.

(j) *Rex v. Mawbey*, 6 T. R. 638. Tidd, 942, 943. *Reg. v. Whitehouse*, Dears. C. C. 1. It seems there can be no new trial in cases of felony, *Ex parte* *Edulegge Byramjee*, 11 Jur. 855; *R. v. Bertrand*, L. R. 1 P. C. 520, 10 Cox, C. C. 618; *Att.-Gen. of New South Wales v. Murphy*, 11 Cox, C. C. 372; *Reg. v.*

*Scaife*, 17 Q. B. 238. 2 Den. C. C. 281; 13 East, 416.

(k) *Rex v. Mawbey*, 6 T. R. 619. *Reg. v. Gompertz*, 9 Q. B. 824. But in conspiracy, if several are convicted, the new trial must be as to all, though only one shows himself to be entitled to it.

(l) *Reg. v. Caudwell*, 17 Q. B. 503, 21 L. J. M. C. 48. *Howard v. Reg.* 11 Law T. 629.

(m) *Rex v. Toal*, 11 East, 307. *Rex v. Askew*, 3 M. & S. 9.

(n) *Reg. v. Parkinson*, 2 Den. C. C. 459, 21 L. J. M. C. 48, note (r).

(o) *Rex v. Spragg*, 2 Burr. R. 930. See *R. v. Hollingberry*, 4 B. & C. 329, where the defendant is in custody on criminal process.

(oo) Note to *Rex v. Spragg*.

(p) *Rex v. Cohen*, 1 Stark. N. P. C. 618; *Att.-Gen. of New South Wales v. Murphy*, 11 Cox, C. C. 372; *Reg. v.*

collateral issue, which may have been found in favour of the defendant on insufficient evidence. (*g*) But where the proceeding is in substance merely to try a civil right, a new trial may be granted where the indictment has been removed as above after an acquittal; (*v*) and therefore a new trial may be granted where the question is as to the liability to repair a highway, (*s*) but not where the charge is a wrongful obstruction of a highway. (*t*) Before the Judicature Acts, when it was intended to move the Court of Queen's Bench for a new trial in a criminal case, either the motion should be made within the first four days of term, or during those days an intimation must have been given to the Court that counsel was prepared to make that motion. (*u*)

## SEC. I.

### Of Presumptive Evidence.

Presumptive  
or circum-  
stantial evi-  
dence.

When a fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily or usually attend such facts, and are called presumptions, not proofs, for they stand instead of the proofs till the contrary be proved. (*v*) In criminal cases, from the secret manner in which guilty actions are generally perpetrated, it is seldom possible to give direct evidence of the commission of the offence charged, i. e. to produce a witness who saw the act committed; and, therefore, recourse must necessarily be had to presumptive (or, as it is often called, circumstantial) evidence, i. e. the direct evidence of circumstances, from which the commission of the act may be presumed by the jury. (*w*)

(*g*) *Rex v. Lea*, 2 M. C. C. R. 9, S. C. 7 C. & P. 836.

(*r*) *Reg. v. Chorley*, 12 Q. B. 515. *Reg. v. Russell*, 3 E. & B. 942, 23 L. J. M. C. 173. *Reg. v. Leigh*, 10 A. & E. 398.

(*s*) *Reg. v. Chorley*, *supra*.

(*t*) *Reg. v. Russell*, *supra*. *Reg. v. Johnson*, 2 E. & E. 613, 29 L. J. M. C. 133.

(*u*) *Reg. v. Newman*, 1 E. & B. 268, 22 L. J. Q. B. 156.

(*v*) *Gilb. Ev.* 142. As if a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword; this is a violent presumption that he is the murderer: for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself, is the proof of those circumstances that do necessarily attend such fact. *Ibid.* Unless the wound was in such a part of the body that the deceased could not have inflicted it himself, and it was shown that no other person had been in the room, it is conceived that such a presumption ought not to be considered as conclusive. In *Ashford v. Thornton*, 1 B. & Ald. 428, where the subject of presumptions in criminal cases was

much discussed, *Abbott, J.*, said, 'A case might be put where a person should come up and find another lying wounded with a dagger in his body, and should draw it out, or should, in assisting the wounded man, wrench the knife out of the murderer's hand; then, if the murderer escaped, leaving him with the body, according to this law [Bracton] he would be considered guilty of the murder, and be immediately hanged without trial.' And, 'in the history of the law, several presumptions which were at one time deemed conclusive by the courts, have, by the opinions of later judges, acting upon more enlarged principles, become conclusive only in the absence of proof to the contrary, or have been treated as wholly within the discretion of juries.' 1 *Phil. Ev.* 441. C. S. G.

(*w*) Presumptions are often divided into three sorts,—violent, probable, and light. Co. Lit. 6 b. 3 *Blac. Com.* 371. But such a classification seems altogether useless, and the distinction to amount to nothing more than that in one case the presumptive evidence may be very strong, in another less so, and in another very weak. See 1 *Stark. Ev.* 838, *et seq.*

Where an indictment for murder was supported entirely by circumstantial evidence, and there was no fact which, taken alone, amounted to a presumption of guilt; Alderson, B., told the jury that before they could find the prisoner guilty, they must be satisfied 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person;' and he then pointed out to them the proneness of the human mind to look for, and often slightly to distort the facts, in order to establish such a proposition, forgetting that a single circumstance, which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt. (x)

What circumstantial evidence is sufficient to warrant a conviction.

There is no difference between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, except that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in the latter, which affect life and liberty. (y)

One of the most usual presumptions in criminal prosecutions occurs in cases of larceny, where upon proof of the felony having been committed, and of the property stolen having been shortly afterwards found in the possession of the prisoner, it is presumed that he actually stole it, unless he prove how he came by it. (z)

Instances of presumptions.

(x) Hodge's case, 2 Lew. 227. See the very able observations on this subject, 1 Stark. Ev. 841, *et seq.*, 859, *et seq.*

(y) 1 Phil. Ev. 166, 7th edit. Perhaps strong circumstantial evidence in cases of crimes, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt: for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming altogether the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous. 1 East, P. C. c. 5, s. 9, p. 223.

(z) Where two prisoners were indicted for stealing two horses, and the case against them consisted entirely of evidence to show that both the horses were found soon after the robbery, in the joint possession of the prisoners, and it appeared that the horses had been stolen on different days, and at different places, Littledale, J., compelled the prosecutor to elect on which of the two stealings he would proceed; and his lordship observed that the possession of stolen property soon after a robbery is not in itself a felony, though it raises a presumption that the possessor is the thief; it refers to the original taking, with all its circumstances. *Rex v. Smith, Ry. & Mowd.* N. P. C. 295. Where the only evidence

against the prisoner was that three sheets were found upon his bed in his house three calendar months after they had been stolen, and it was urged that this was too long a time after the larceny to call on the prisoner to give any account how he had become possessed of them; and *Rex v. Adams, ante*, vol. 2, p. 275, was relied upon; Wightman, J., held that the case must go to the jury, as it seemed to him that it was impossible to lay down any definite rule as to the precise time, which was too great to call upon the prisoner to give an account of the possession, and that in this case there was *some* evidence, although *very slight*, for the jury to consider. The prisoner was acquitted. *Reg. v. Hewlett, Salop Spring Ass.* 1843, MS. C. S. G. See vol. 2, p. 275, *et seq.*, and *Reg. v. Knight, L. & C.* 378, and *Reg. v. Langmead, L. & C.* 427, vol. 2, p. 277. Mr. Starkie observes that 'the recent possession of stolen goods is recognised by the law as affording a presumption of guilt, and therefore, in one sense, is a presumption of law, but it is still in effect a mere natural presumption; for although the circumstance may weigh greatly with the jury, it is to operate solely by its natural force, for a jury are not to convict unless they be actually convinced in their consciences of the truth of the fact. Such a presumption is, therefore, essentially different from the legal presumptions in fact where a jury are to infer that a bond has not been satisfied, as a few days or even hours, more or less,

So also on an indictment for the crime of arson, proof that property, which was taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner, raises a presumption that the prisoner was present, and concerned in the arson. (*a*) So also proof that clothes, weapons, or implements, which are shown to have been previously in the possession of the prisoner, were found at or near to the spot where a felony was committed, is frequently adduced in order to raise a presumption that the prisoner was present at the time when the felony was committed. (*b*) The buying goods at an under value is said to be presumptive evidence that the buyer knew they were stolen. (*c*) Upon an indictment for perjury, in falsely taking the freeholder's oath at the election of a knight of the shire, in the name of J. W., it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W., and who swore to his freehold and place of abode; and that there was no such person, and that the defendant voted on the second day, and was no freeholder, and some time afterwards boasted that he had done the trick, and was not paid enough for the job, and was afraid he should be pulled for his bad vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of J. W., it was held that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge as alleged in the indictment. (*d*)

Date of instruments.

Ordinarily all instruments are written at the time they bear date, and therefore the date of any instrument is presumptive evidence that it was made at the time of that date. (*e*) The date, therefore of a bill of exchange is *prima facie* evidence that it was drawn at that date. (*f*)

Acceptance of a bill.

Ordinarily also a bill of exchange is accepted shortly, within a few days, after it is drawn. The date of the bill, therefore,

have elapsed, when the twenty years are expiring.' 2 Stark. Evid. 684.

(*a*) *Rex v. Rickman*, 2 East, P. C. 1035.

(*b*) In *Reg. v. Stonyer and others*, Stafford Spr. Ass. 1843, *cor. Wightman, J.*, on an indictment for burglary in the house of Keeling, evidence was given of the finding of a crowbar in the house of one Bladon, which was near Keeling's, and was broken into the same night, it being proved that the crowbar had been previously seen in the possession of the prisoners, and a chest of drawers in Keeling's house having been broken open by such an instrument. Such is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which by means of such an instrument had been burglariously entered. 1 Stark. Ev. 844. Greenl. Ev. 49. See *R. v. Exall*, 4 F. & F. 922.

(*c*) *Ante*, vol. 2, p. 486.

(*d*) *Rex v. Price*, 5 East 329. *Microsoft*

following is an example of a case of circumstantial evidence too weak for conviction. Two women were indicted for colouring a shilling and sixpence, and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after the apprehension, he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three-shilling piece, five bad shillings, and five bad sixpences. Upon a case reserved, the judges thought the evidence too slight to convict him. *Rex v. Isaacs*, MS. Bayley, J., *ante*, vol. 1, p. 208.

(*e*) *Roberts v. Bethell*, 12 C. B. 778.

(*f*) *Ibid.*; except in case of a bill, which constitutes a petitioning creditor's debt in bankruptcy. As to the date of letters, see *ante*, p. 317.

though not evidence of the very date of the acceptance, is reasonable evidence of the acceptance having taken place within a short time after that day, regard being had to the distance the bill would have to travel from the one party to the other. (g)

A very common presumption is made by a jury in favour of a defendant from the goodness of his character; which subject, together with the presumption as to the intent of a prisoner, or his guilty knowledge respecting the act which is the subject of the indictment, raised upon the proof of prior acts unconnected with it, will be considered in a subsequent chapter, where the rule as to evidence being confined to the points in issue is discussed. (h)

From good character.

Most important presumptions are derivable from the conduct of the parties, as well in civil as in criminal proceedings. If circumstances induce a strong suspicion of guilt, and where the accused might, if he were innocent, explain those circumstances consistently with his own innocence, and yet does not offer such explanation, a strong natural presumption arises that he is guilty. And in general, where a party has the means of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a forcible inference against him. (i)

Conduct.

Presumptions from a man's conduct operate in the nature of admissions; for, as against himself, it is to be presumed that a man's actions and representations correspond with the truth. (j) And admissions may be presumed, not only from the declarations or acts of a party accused, but even from his acquiescence or silence. (k)

Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance. (l)

Suppression of evidence.

So the fabrication of evidence is calculated to raise a presumption against the party who has recourse to such a practice, not less than when evidence has been suppressed or withheld. (m) Legal experience, however, has shown that false evidence has sometimes been resorted to for proving facts that are true. (n)

Falsification of evidence.

(g) Per Maule, J., *ibid*.

(h) See also as to the presumption that a ship never heard of has foundered. *Green v. Brown*, 2 Str. 1199. *Twemlow v. Oswin*, 2 Campb. 85. *Houstman v. Thornton*, Holt, 242. *Koster v. Reed*, 6 B. & C. 19. So where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the post-office, this is equivalent to proof of delivery to the hands of that person; because it is a safe and reasonable presumption that it reaches its destination. Per Lord Tenterden, *Walter v. Haynes*, 1 R. & M. N. P. C. 149.

(i) 2 Stark. Evid. 688. 1 Stark. Evid. 862.

(j) *Ibid*. See *Pickard v. Sears*, 1 R. & E. 469.

(k) 2 Stark. Evid. 17, 21.

(l) 1 Phil. Evid. 447, citing *Harwood v. Goodright*, Cowp. 87. 1 Stark. Evid. 847.

(m) 1 Stark. Ev. 847.

(n) 1 Phil. Ev. 448. Referring to 3 Institute, 232, where a case is mentioned of an uncle, who was hanged for the murder of his niece, and who produced on the trial a child as like unto her, both in person and years, as he could find, but which upon examination was found not to be the true child; and it afterwards appeared that the niece had run away, and was alive. And also the *Douglas Peerage* case, Appendix to *Evans' Pothier*. 'The fabrication of evidence does not, however, furnish of itself any presumption of guilt, but it tends to prove the innocence of the party, but is a matter to be dealt with by the

Presumption of continuance.

Other presumptions are founded on the experienced continuance or permanency, of longer or shorter duration, in human affairs.

When, therefore, a state of things, is once established by proof, the law in general presumes that the state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised from the nature of the subject in question. (*o*)

Partnership.

A partnership or other similar relation, once shown to exist, is presumed to continue till it is proved to have been dissolved. (*p*)

Attorney.

So where an indictment alleged that the defendant made his warrant of attorney directed to A. and B., 'then and still being attorneys of the King's Bench,' it was held that as the defendant, by executing the warrant, admitted them to be attorneys at that time, it must be presumed that they continued to be so at the time when the indictment was found. (*q*)

Officers.

So a party once elected to an office must be presumed to continue in it until the contrary be shown. Thus a return made to the stamp-office by a banking co-partnership in March 1841, stating a person to be a public officer of the company, being proof that he was an officer at that time, the presumption is that he continued such officer until November 1842. (*r*) But if the office had been an annual office, it would have been otherwise. (*s*)

Registration.

So where a building is shown to have been properly registered for the celebration of marriages, the presumption is that it continued to be registered. (*t*)

Of life and death.

In *R. v. Lumley*, (*u*) which was an indictment for bigamy, noticed *ante*, p. 266, the Court said, 'The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If on the other hand, it were proved that he was then in a dying condition and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. After the lapse of seven years, without intelligence concerning a person, his death may be presumed. (*v*) But there is no legal presumption as to the time of the death within the seven years, and the fact of the party having been alive

jury. Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts.' Greenl. Ev. 43.

(*o*) Greenl. Ev. 46, 47, citing *Throgmorton v. Walton*, 2 Roll. R. 461. *Wilson v. Hodges*, 2 East, R. 312. *Battin v. Bigelow*, 1 Pet. C. C. R. 452.

(*p*) Greenl. Ev. 43. 2 Stark. Ev. 688. *Alderson v. Clay*, 1 Stark. R. 405.

(*q*) *Rex v. Cooke*, 7 C. & P. 559, *Paterson, J.*

(*r*) *Steward v. Dunn*, 12 M. & W. 655.

(*s*) *Per Parke, B.*, *ibid.*

(*t*) *Reg. v. Mansfield*, 11 M. & W. 101.

(*u*) See *Rex v. Twynning*, 2 B. & Ald. 386. *Rex v. Harborne*, 2 A. & E. 540. Upon an issue of the life or death of a party, the jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur: as if the party sailed on a voyage, which should long since have been accomplished, and the vessel has not been heard of. Greenl. Ev. 47, referring to *In re Hutton*, 1 Curt. 595.

(*v*) *Hopewell v. De Pinna*, 2 Campb. 113. *Doe d. George v. Jesson*, 6 East R. 80. *Doe d. Lloyd v. Deakin*, 4 B. & Ald. 433. *Watson v. King*, 1 Stark. R. 121. It has been held in America not to be necessary that the party be proved to

or dead at any particular period during the seven years must be proved by the party relying on it. (*w*)

So where a thing is proved to have been in a particular state at one time, it is presumed to have been in that state at a former time, unless there be evidence that at some previous time it was in a different state. (*y*) Where, therefore, in order to prove certain assessments of land-tax, the signatures of certain persons to them were proved, and it was shown that those persons had acted as commissioners after the date of the signatures, but there was no evidence of their having so acted before, it was held that the acting as commissioners within a reasonable time after the date of the signatures was evidence that they were commissioners at that time; for the inference might be carried upwards as well as downwards. (*z*)

Presumption as to previous time.

The *opinions* also of individuals once entertained and expressed, and the *state of mind*, once proved to exist, are presumed to remain unchanged till the contrary appears. Thus all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God till it is shown from his own declarations. In like manner, every man is presumed to be of sane mind till the contrary is shown; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue till disproved. (*a*)

Opinions and state of mind.

Besides the presumptions which a jury may make from circumstantial evidence, there are also presumptions of law. Thus, on every charge of murder, the fact of killing being first proved, the law presumes it to have been founded on malice till the contrary appear; and therefore all circumstances alleged by way of justification, excuse, or alleviation, must be proved by the prisoner, unless they arise out of the evidence produced against him. (*b*)

Presumptions of law.

Indeed, it is a universal principle, as Lord Ellenborough observed in the case of *Rex v. Dixon*, (*c*) that when a man is charged with doing an act, of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the doing the act. In the case of *Rex v. Sheppard*, (*d*) uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, was held sufficient evidence of an intent to defraud that person; and it was further

Of the probable consequence of an act.

be absent from the United States; it is sufficient if it appears that he has been absent for seven years from the particular State of his residence, without having been heard from. Greenl. Ev. 47, note 5, citing Newman v. Jenkins, 10 Pick. 515. Innis v. Campbell, 1 Rawle, 373. Spurr v. Trimble, 1 A. K. Marsh, 278. Wambough v. Skenk, 1 Penningt. 167. Woods v. Woods, 2 Bay, 476. 1 New York Rev. Stat. 749, s. 6.

(*w*) Doe d. Knight v. Nepean, 5 B. & Ad. 86. 2 M. & W. 894.

(*y*) Rex v. Burdett, 4 B. & Ald. 124, per Best, J. In this case a letter was delivered to a person, unsealed, in Middlesex, and it was held that it must be presumed that it was sent in that county from Leicestershire, there being no evi-

dence to the contrary.

(*z*) Doe d. Hopley v. Young, 8 Q. B. 63. Where a demise in ejectment was laid on the 2nd of May, it was held that the jury might presume from the evidence of there being no sufficient distress on the premises *some time* in May, that there was none in May before the 2nd, nor on the 6th of June, when the declaration was served. Doe, lessee of Smelt v. Fuchan, 15 East, R. 286.

(*a*) Greenl. Ev. 48. Attorney-general v. Parnter, 3 Bro. Ch. C. 443.

(*b*) Fost. 255. 1 East, P. C. c. 5, s. 106, p. 340.

(*c*) 3 M. & S. 15.

(*d*) R. & R. 169. *Ante*, vol. 2, p.

held, that the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, would not repel the presumption of an intention to defraud. So where the prisoner was indicted (under the repealed statute, 43 Geo. 3, c. 58) for setting fire to a mill, with intent to injure the occupiers thereof, it was held, that an injury to the mill being the necessary consequence of setting fire to it, the intent to injure might be inferred; for a man must be supposed to intend the necessary consequence of his own act. (e) So in prosecutions for forgery, a jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. (f)

In the case of *Rex v. Fuller* and another, (g) the twelve judges were of opinion, that the having in possession a large quantity of counterfeit coin unaccounted for, and that without any circumstance to induce a belief that the defendants were the makers, was evidence of having procured it with intent to utter it. (h)

Presumptions  
with respect to  
age.

It seems to be a presumption not admitting of proof to the contrary, that a person under the age of fourteen is unable to commit the crime of rape; (i) and also that an infant under the age of seven cannot be guilty of felony; (j) and it is a *prima facie* presumption of law that a person under the age of fourteen is not guilty of a felonious intention, until evidence be produced to show that he is *doli capax*; for then it is said *malitia supplet ceterum*. (k)

Presumption  
of innocence.

In general, however, a presumption of law arises in favour of innocence until the contrary is proved; (l) and it arises not only in matters essentially criminal, but in every instance the rule is, that illegality is never to be presumed, but that the presumption always is, that a party complies with the law. (m) So it is a legal maxim, that '*omnia præsumuntur esse rite et solemniter acta donec pro-*

*Omnia esse  
rite acta.*

(e) *Rex v. Farrington*, R. & R. 207. *Ante*, vol. 2, p. 918.

(f) *Rex v. Mazagora*, R. & R. 291. *Ante*, vol. 2, p. 688. See also *Reg. v. Hill*, 2 M. C. C. R. 30, *ante*, vol. 2.

(g) *R. & R. 308*. *Ante*, vol. 1, p. 225.

(h) See further as to the primary intention, including the collateral one imputed in the indictment, and the necessary proof of the particular intent laid. *Ante*, vol. 1, p. 925, *et seq.* 2 Stark. Ev. 573.

(i) 1 Hale, P. C. 630. *Rex v. Groombridge*, 7 C. & P. 582. *Rex v. Eldershaw*, 3 C. & P. 396, *ante*, vol. 1, p. 859.

(j) 1 Hale, P. C. 27, *ante*, vol. 1, p. 109.

(k) 1 Phil. Evid. 443, citing *Rex v. Owen*, 4 C. & P. 236.

(l) See *Rex v. T. J. King*, 2 C. & P. 11, 386.

But see *Rex v. Harborne*, *ante*, p. 324, note (u).

(m) *Sissons v. Dixon*, 5 B. & C. 758. See also *Bennett v. Clough*, 1 B. & A. 461, which was an action against a carrier for losing a parcel containing some bank notes, stamps, and a letter. For the defendant it was said, that the 42 Geo. 3, c. 81, s. 5, made it illegal to send a letter in a parcel, and that the plaintiff therefore could not recover. But there is a proviso in that section, that it shall not extend to any letter concerning goods, sent by a common carrier of goods, to be delivered with the goods to which it relates; and the Court held, that as illegality is never presumed, the defendant should have given *prima facie* evidence that the letter did not concern the stamps with which it was sent. See also *Rodwell v. Redge*, 1 C. & P. 220.



*betur in contrarium* ;' (n) and, therefore, it is a general presumption of law, that a person acting in a public capacity, as a peace officer, justice of the peace, constable, &c., is duly authorized to do so ; (o) and that even in a case of murder. (p) And this rule of evidence runs through all offices from that of a judge to that of a vestry clerk. (q)

The general rule applicable to the doctrine of presumption is, that we are to presume that which reasonably accounts for the existing state of things. (s) Thus the relations of landlord and tenant, of partnership, and of marriage, are frequently presumed from the conduct of the parties being consistent with that state of things, and more consistent with that state than any other. (t)

It may be proper here to mention the two well-known cautions of Lord Hale respecting presumptive evidence, viz. 1. That a person should never be convicted for stealing the goods *cujusdam ignoti*, because he cannot give an account of how he came by them, unless there be due proof made that a felony was committed of these goods. 2. That a person should never be convicted of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead. (u)

What reasonably accounts for a state of things is to be presumed.

Caution of Lord Hale as to presumptions.

## SEC. II.

### *The best possible Evidence must be produced.*

It is a general rule that you must give the best evidence that the nature of the thing is capable of : (v) the true meaning of which rule is not that in every matter there must be all that force and attestation that by any possibility might have been gathered to prove it, and that nothing under the highest assurance possible shall be given in evidence, but that no such evidence shall be brought that *ex naturâ rei* supposes still greater evidence behind in the party's possession or power ; for such evidence is altogether insufficient, and proves nothing, as it carries a presumption with

General rule that best possible evidence must be produced.

(n) As that a marriage was lawfully celebrated. See *Reg. v. Manwaring*, D. & B. 132, *ante*, p. 301.

(o) *Rex v. Verelst*, 3 Campb. 432. Gordon's case, 1 Leach, 515. S. C. 1 East, P. C. pp. 312, 315.

(p) By Buller, J., in *Berryman v. Wise*, 4 T. R. 366. See also *Rex v. Rees*, 6 C. & P. 606. *Rex v. Borrett*, 6 C. & P. 124. *Butler v. Ford*, 3 Tyrw. 677 ; 1 C. M. & R. 662. *Reg. v. Murphy*, 8 C. P. 297.

(q) Per Patteson, J., in *Marshall v. Lamb*, 5 Q. B. 115. *Doe d. Bowley v. Barnes*, 8 Q. B. 1037. *Wolton v. Gavin*, 16 Q. B. 48 ; where a soldier had been enlisted more than three weeks, and had been employed to enlist recruits, and had done so, and it was held that it might be presumed that he had been attested. In this case Erle, J., mentioned an anonymous case where, in support of marriage, the only proof that the party who

performed the ceremony was a priest, was the fact that he performed it ; and this was held enough. See also *Plumer v. Brisco*, 11 Q. B. 46. *Bunbury v. Matthews*, 1 C. & K. 380.

(s) Per Bayley, J., *Rex v. St. Mary-lebone*, 4 D. & R. 475.

(t) Per Erle, J., *Reg. v. Fordingbridge*, E. B. & E. 678, where a witness proved that more than sixty years before he lived with the same master as the pauper, and believed him to be an apprentice, and that he was instructed by a journeyman, and lodged and boarded in the house, with two others, who were instructed in the art of a tailor, and, after proof of due search for the indentures without success, it was held that this state of things could only be accounted for by the existence of an indenture of apprenticeship.

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(v) Bull, N. P. 293.

it contrary to the intention for which it is produced. For if the other greater evidence did not make against the party, why did he not produce it to the Court? As if a man offer a copy of a deed or will where he ought to produce the original, this carries a presumption with it, that there is something more in the deed or will that makes against the party, or else he would have produced it; and, therefore, the proof of a copy in this case is not evidence: (*w*) but if he prove the original deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence: the presumption of greater evidence behind in the party's possession being overturned by positive proof. (*x*)

Hence it appears that evidence of an inferior quality, or, as it is called, secondary evidence, cannot be received until it be shown that no evidence of a superior quality, or, as it is termed, primary evidence, can be produced. It becomes necessary, therefore, to consider, 1st, What is primary evidence. 2ndly, What is a sufficient ground for the admission of secondary evidence. 3rdly, What is good secondary evidence.

1. What is primary evidence.

Contents of will.

Execution of will proved by one of three witnesses.

Primary evidence of handwriting.

Of disproving handwriting.

Other instances of primary evidence.

1. What is primary evidence. It has already appeared that it is the quality and not the quantity which the rule requiring the best possible evidence regards. Thus, if a will of lands is to be proved, the primary proof of the contents is the will itself; and neither an exemplification under the great seal, nor the probate in the spiritual court, will be admissible: (*y*) but one of the three subscribing witnesses will be sufficient, without calling the others to prove the execution, if he can speak to all the requisites of attestation, and the jury believe him. (*z*) So if there are several subscribing witnesses to a deed, and all are proved to be dead, proof of the signature of one will be sufficient; for the proof is, as far as it goes, complete, and not inferior in its kind to any that can be produced. (*a*) So for the purpose of proving handwriting, where it happens to be a case where there would be no objection to the competency of the writer himself, it is not necessary to call him: it is sufficient to prove it by the evidence of some one acquainted with the general character of his writing, who, on inspection, can say he believes it to be the handwriting of the party. The evidence of such a witness is not in its nature inferior or secondary; and though it may generally be true that the writer is best acquainted with his own handwriting, and, therefore, his evidence will in general be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons who have been in the habit of seeing him write. (*b*) And it seems, that on the same principle, the evidence of such persons is as much primary evidence to disprove his handwriting as to prove it. (*c*) On an indictment for unlawfully assembling, it was held, that a paper which had been delivered by Hunt

(*w*) Ibid. Gilb. Ev. 13.

(*x*) Bull. N. P. 293.

(*y*) Bull. N. P. 246. But the probate is the best evidence as to personality.

(*z*) Bull. N. P. 264. So the execution of a will has been held to be proved by evidence of the testimony of one of the subscribing witnesses, who was dead,

given on a trial between the same parties although another attesting witness was present and not called. Wright v. Doe d. Tatham, 1 A. & E. 3. See also Doe d. Spilsbury v. Burdett, 4 A. & E. 1.

(*a*) 1 Phil. Ev. 418.

(*b*) 1 Phil. Ev. 223, 7th edit., *post*.

(*c*) *Post*.

to the witness at a meeting, as a copy of certain resolutions about to be proposed and read, and which corresponded with what the witness heard read from a written paper, was admissible as evidence of those resolutions, without giving the defendant notice to produce the original. (*d*) And in the same case, it was decided that parol evidence of inscriptions, or devices on banners and flags displayed at the meeting, was admissible without producing the originals, though it appeared that they had been seized by the police officers, and therefore might have been produced on the part of the prosecution. (*e*)

The contents of a written instrument must be proved by the instrument itself, unless it be lost, or in the hands of the other party. (*f*) And, generally speaking, parol evidence is secondary in its nature to written evidence: and where a written instrument is required by law, or made by a private compact to express the intention of the parties, it possesses a force and authority superior to any other evidence. (*g*) Thus, when an agreement has been reduced into writing, the writing itself must be produced. (*h*) And although a day-book be the best evidence to prove any matter entered in it, yet it is not necessary to produce it to prove that no entry of a fact was made in it. (*i*) But, in many instances, the mere existence of written evidence will not exclude independent parol evidence to prove the same fact. Thus, where upon letting premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over and assented to by him, and it was then agreed that he should on a future day bring a surety, and sign the agreement, it was held that the existence of this memorandum did not preclude parol evidence of the terms of the letting. (*j*) So where a verbal contract is made for the sale of goods, and it is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but not signed by the vendor, the terms of the contract may be given in evidence on the part of the vendor, without producing the writing. (*k*) Where a party paying money has taken a receipt, the circumstance of a payment having been acknowledged in writing does not make such writing exclusively primary evidence of the fact; but he may show the payment by a person who saw the money paid, or by the admission of the other party to that effect. (*l*) If several persons be witnesses of the same fact, and one of them, to assist his memory, makes a memorandum of it, this circumstance would

Written instruments.

Parol evidence not always secondary to written.

(*d*) *Rex v. Hunt*, 3 B. & A. 566.

(*e*) *Ibid.* Abbott, C. J., said, 'If we were to hold that what was inscribed on a banner could not be proved without the production of the banner, I do not know upon what reason the witness should be allowed to mention the colour of the banner, or even to say he saw the banner displayed; for the banner itself may be said to be the best possible evidence of its existence and of its colour.'

(*f*) As to statements made by a party being evidence against him, though they relate to the contents of a written document, see *post*, p. 349.

(*g*) 1 Stark. Ev. 504.

(*h*) *Brewer v. Palmer*, 3 Esp. 213, *cor.*

*Lord Eldon, C. J. Sinclair v. Stevenson*, 1 C. & P. 582, *cor. Best, C. J.*

(*i*) In *Macdonnell v. Evans*, 11 C. B. 930, Manle, J., said 'Suppose a man is asked whether he made an entry in his day-book, and he says No, it cannot be necessary to produce the book.'

(*j*) *Doe v. Cartwright*, 3 B. & A. 326. See also *Wilson v. Bowie*, 1 C. & P. 8.

(*k*) *Dalison v. Stark*, 4 Esp. 163.

(*l*) *Rambert v. Cohen*, 4 Esp. 213. *Jacob v. Lindsay*, 1 East, R. 460. And if the receipt were on unstamped paper, it may be used by a witness, who saw it given, to refresh his memory, 4 Esp.

not exclude the testimony of the other witnesses. (*m*) So parol evidence of what a person said on the hearing of an information for a trespass in pursuit of game, under the 1 & 2 Will. 4, c. 32, is admissible, although there be a deposition which is not produced, as there is no Act of Parliament requiring the magistrates to take down the evidence in such a case; but it is otherwise in the case of felony, where the depositions must be produced, because, by statute, magistrates are bound to take down what the witnesses say. (*n*) So where the defendant made a charge against the plaintiff before a magistrate, and what he said was taken down by the clerk, but not signed either by the defendant or the magistrate, and the case was subsequently heard and depositions taken; Cresswell, J., held that parol evidence was admissible of what was said on the first examination. (*o*) So, though an entry of a marriage may have been made in the parish register according to the Marriage Act, such entry does not become the only primary evidence of the marriage, but it may also be proved by any one who witnessed it; and, indeed, in all cases except indictments for bigamy, by reputation. (*p*) Where, in order to prove a demand for the purpose of bringing an action of trover for a lease, a witness stated that he had verbally required the defendant to deliver up the lease, and at the same time served a notice in writing on him to the same effect; Lord Ellenborough, C. J., held that the written notice need not be produced; for the notices being concurrent and independent, either might be proved as evidence of the conversion. (*q*)

The above are instances of modes of proof which, notwithstanding the existence of other evidence which might be more satisfactory, are yet in their nature primary, and consequently available. It may be useful to mention also some examples of what is not the best possible evidence, and therefore inadmissible. Upon an indictment for having set fire to a house, with intent to defraud an insurance company, the policy is the best evidence to prove that the house was insured, and an entry to that effect in the books of the insurance office is but secondary evidence. (*r*) To prove the oaths required by the Toleration Act, parol evidence was held secondary, and inadmissible; because they were matters of record in the court where they were sworn. (*s*) It has been ruled that parol evidence is inadmissible to show the day on which a trial at nisi prius took place; for it should be proved by the production of the nisi prius record. (*t*) But this position may well be

Instances of  
what is not the  
best possible  
evidence.

Insurance.

Matters of  
record.

Acts of a  
court.

(*m*) 1 Stark. Ev. 504. So in Laver's case for high treason, Mr. Stanley, an under-secretary of state, gave evidence of L.'s confessions, upon his examination before the council, which, though taken in writing, was not produced. 12 Vin. Abr. 96, tit. *Evidence*, A. b. 623, pl. 7.

(*n*) Robinson v. Vaughton, 8 C. & P. 252, Alderson, B.

(*o*) Jeans v. Wheedon, 2 M. & Rob. 486.

(*p*) Morris v. Miller, 1 W. Bl. 632. It may also be observed that, in order to make the production of the writing necessary, it must appear to relate to the matter in question. Thus, where parol

evidence is offered to prove a tenancy, it is not a valid objection, that there is some written agreement relative to the holding, unless it should also appear that it was made between the parties as landlord and tenant, and that it continues in force to the very time to which the parol evidence applies. Doe v. Morris, 12 East, 237. Doe v. Pearson, 12 East, 239 n.

(*q*) Smith v. Young, 1 Campb. 439.

(*r*) Rex v. Doran, 1 Esp. 127. Rex v. Gilson, R. & R. 138.

(*s*) Rex v. Hube, Peake, N. P. C. 132.

(*t*) Thomas v. Ansley, 6 Esp. 80, by Lord Ellenborough. Rex v. Page, 6 Esp. 83, by Lord Kenyon. Tidd, Prac.

doubted, for the assizes and sittings at nisi prius often continue more than a day, and though the record might simply name the first day, yet a court for the purpose of doing substantial justice would allow it to be proved that a trial in fact took place on a different day. Where, therefore, a commission day was on the 19th of March, and an assignment of goods was made by a prisoner on the 20th, and he was convicted of felony on the 22nd, it was held that it might be proved that in fact the conviction took place on the 22nd, although the record stated the assizes to have been holden on the 19th. (u) If it be necessary to prove that a trial took place, as in the case of a prosecution for perjury committed on the trial of a cause at nisi prius, that cannot be done by parol evidence, but the record should be produced, or at least the postea. (v) And even where the transactions of courts which are not technically speaking of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognizes. (w) On an indictment on the 8 & 9 Will. 3, c. 26 (for high treason by having a mint die in possession), it was incumbent on the prosecutor to show that the prosecution was commenced within three months, and parol evidence that the prisoner was apprehended for treason respecting the coin within three months (the offence appearing to have been committed above three months before the indictment preferred), was held by the twelve judges to be insufficient, the warrant to apprehend or to commit not being produced. (x) In the case of *Williams v. The East India Company*, (y) the question was, whether the agent of the defendants, who were the freighters of the plaintiff's ship, had apprised the plaintiff or his officers of the inflammable and dangerous nature of a quantity of roghan which had been stored in the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them; the chief mate was dead, and no evidence was given of what had passed between him and the conductor of the stores; but the captain and second mate proved that no communication had been made to them. Upon this evidence, the plaintiff who, it was held, was bound to prove the negative, was nonsuited by Lord Ellenborough, C. J., on the ground that the best evidence possible of the want of notice had not been produced, viz., the evidence of the conductor of stores. The Court afterwards affirmed the nonsuit; and Lord Ellenborough, in delivering their opinion, said, 'The best evidence should have been given of which the nature of the case was capable. The best evidence was to have been had by calling, in the first instance, upon the persons immediately and officially employed in the delivering, and in the receiving of the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor, the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff

Commence-  
ment of pro-  
secution.

Negative  
proof of no-  
tice.

869. But see *Rex v. Coppard*, *ante*, lands, 1 F. & F. 72.  
p. 37. (x) *Rex v. Phillips*, R. & R. 369. See  
(u) *Whitaker v. Wisbey*, 12 C. B. 44, vol. 1, p. 626.  
(v) *Ante*, p. 89.  
(w) 3 Stark. Ev. 786. See *R. v. Row-*

Negative  
proof of con-  
sent.

in resorting to an inferior and secondary species of testimony (namely, the presumption and inference arising from a non-communication to the other persons on board), as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board could be resorted to ; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case.' In a case on an indictment on the 42 Geo. 3, c. 107, s. 1, which made it felony to course a deer in an enclosed ground, without the consent of the owner of the deer ; Lawrence, J., thought it necessary to call the owner of the deer, for the purpose of disproving his consent, and the owner not being called, the jury were directed to find a verdict of acquittal. (z) But this decision has been overruled by subsequent authorities of the greatest weight : and the rule may now be considered settled that, in cases where it is necessary to prove the non-consent of the owner of the property which is the subject of the charge in the indictment, the testimony of the owner himself is not exclusively primary evidence of the non-consent ; but it may be inferred from the conduct of the prisoner, and the circumstances under which the act was done. Where the prisoners were indicted on the 6 Geo. 3, c. 36, for lopping and topping an ash timber-tree, ' without the consent of the owner,' the owner, Sir J. Aubrey, had died before the trial. The offence was committed at eleven o'clock at night on the 18th of February. Sir J. Aubrey died on the 1st of March following, having given orders for apprehending the prisoners on suspicion. The land steward was called to prove, that he himself never gave any consent, and from all he had heard his master say, he believed that he never did. Bayley, J., told the jury that they must be perfectly satisfied that the prisoners had not obtained the consent of the owner of the tree, namely, Sir J. Aubrey, that they might lop and top it ; and left it to them to say, whether they thought there was reasonable evidence to show that in fact he had not given any such permission. His lordship adverted to the time of night when the offence was committed, and to the circumstance of the prisoners' running away when detected, as evidence to show that the consent required had not in fact been given. (a) And in three cases, reserved at once for the opinion of the twelve judges, it was held that, though there must be some evidence to negative the owner's consent, his non-consent might be inferred from the circumstances, or proved by his agents. The first of the three cases was *Rex v. Allen*, an indictment for killing a fallow deer in the park of the forest of Waltham, without the consent of the owner, the King ; the second, *Rex v. Argent*, for entering a yard adjoining and belonging to the dwelling-house of J. Greenwood, a Quaker, and taking fish out of a pond there without the consent of the owner ; and the third, *Rex v. Chamberlain*, for taking fish in Claremont Park, belonging to Prince Leopold, without his consent. The offence in each case was committed under circumstances which the learned judge, who tried it, thought quite sufficient to warrant the jury in finding the non-consent of the owner, admitting the onus of proving such non-

(z) *Rex v. Rogers*, 2 Campb. 654. See 136.  
Tolman v. Portland, 12 B. & C. 458. (a) *Rex v. Hazy*, 2 C. & P. 458.

consent to lie on the prosecutor; but in consequence of the decision in *Rex v. Rogers*, above mentioned, further evidence was gone into, by calling the persons engaged in the management of the property, but not the owners. The judges held the conviction in each of the cases right. (b)

2ndly. What is a sufficient ground for the admission of secondary evidence. If the primary evidence be lost or destroyed, or it cannot be produced, or if it be in the hands of the adverse party, then upon proof of the loss or destruction, or that it cannot be produced in the former cases, or of the fact of its being in such possession, and of reasonable notice to produce it at the trial having been given to the other party, in the latter case, secondary evidence is admissible. (c) Where secondary evidence is offered, in consequence of the loss of the primary evidence, in order to establish such loss it must be proved that diligent search has been made in those quarters from which the primary evidence was likely to be procured. The evidence of a document being lost may vary much, according to the nature of the paper itself, the custody it is in, and all the surrounding circumstances. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper, which nobody would take care of. (d) In the case of *Kensington v. Inglis* (e) it was incumbent on the plaintiff to prove the loss of a license to trade; and a witness, who had been secretary to the governor of a colony, said it was his practice to destroy or put aside such licenses among the waste papers of his office, as not being of further use, and he supposed he had disposed of the license in question (which, after having been granted by the governor, was returned to the witness), in the same manner as other licenses for ships whose voyages had been performed; but he was not sure it was destroyed. He further stated, that he had been applied to for the license, and had searched for it; but he did not recollect whether he found it or not; though he did not think that he had found it.

2. What is sufficient ground for the admission of secondary evidence.

Where the primary evidence is lost.

What is sufficient proof of loss.

(b) R. & M. C. C. R. 154.

(c) Besides these two instances of the loss or destruction of the primary evidences, and its being in the hands of the adverse party, it should seem that secondary evidence is admissible in all cases where it is apparent that such secondary evidence is the best, which the party without any default, has it in his power to produce; for then the presumption of a fraudulent suppression of the better evidence, which is the foundation of the rule, must cease. Thus, if an attesting witness to a written instrument after his attestation became incompetent from interest, proof of his handwriting was admissible. *Godfrey v. Norris*, 1 Str. 24. So if he became incompetent from infamy, *Jones v. Mason*. 2 Stra. 833. The defendant, in an action of trespass for breaking hatches, offered in evidence articles of agreement, dated in 1745, between persons standing in the respective situations of the plaintiff and defendant. To produce this deed the defendant's attorney was called, who said

he had received it from the son of the owner of the defendant's land. This evidence was objected to as insufficient: then the son of the owner was called, who said he had received it from his father that morning; this being also objected to, the father was called; upon which the plaintiff examined him upon the *voire dire*, and objected that he could not be a witness, being interested; whereupon Holroyd, J., held, that as the father was objected to, the next best evidence had been given, and admitted the deed. *Card v. Jeans*, Manning's Dig. 375. If a deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, secondary evidence is admissible, for the original is then unattainable by the party offering such evidence. *Doe v. Ross*, 7 M. & W. 102, *Newton v. Chaplin*, 10 C. B. 356.

(d) Per Pollock, C. B. *Gathercole v. Miall*, 15 M. & W. 319.

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Lord Ellenborough, C. J., in delivering the judgment of the Court, (*f*) said, 'We are of opinion, that this evidence satisfies what the law requires in respect of search; and establishes with reasonable certainty the fact of the license being lost. It was not to be expected that the witness should be able to speak with more confident certainty to a fact, to which his attention would not be particularly drawn at the time, on account of any importance being supposed to belong to it.' In the preceding case the search was neither recent nor made for the purpose of the cause (*g*); and it has since been held that neither was necessary. Where, therefore, a search had been made nearly three years before the action was brought, but it did not appear for what purpose, it was held sufficient. (*h*)

The search need not be recent nor for the purpose of the cause.

Useless documents.

Where it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and having become useless on account of a second policy being effected, it had probably been returned to the plaintiff; and the clerk of the plaintiff's attorney proved that, a few days before the trial of the action, he had searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place which he thought likely to contain a paper of this description; it was held that this was sufficient evidence to entitle the plaintiff to give secondary evidence of the contents of the policy. In this case, Abbott, C. J., observed, that where the loss or destruction of an instrument may almost be presumed, very slight evidence of its loss or destruction will be sufficient. (*i*) If a person proved that he had searched for an envelope among his papers, and could not find it, that would be sufficient. So with respect to an old newspaper, which had been at a public coffee-room; if the party who kept the coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and said he supposed some one had taken it away, that would be sufficient. (*j*)

Documents in bankruptcy.

Where a duplicate adjudication of bankruptcy was left at the counting-house, being the usual and last-known place of business of the bankrupts, on the 21st of June, and the place then locked up on behalf of the assignees, and the paper was seen there a fortnight or three weeks afterwards, and on the 26th of July the summons to appear was left in the same counting-house, which was unlocked for the purpose, and then locked up again, and before the trial the counting-house was searched, and neither of these papers could be found, and due notice to produce them had been given, it

(*f*) 8 East, 289.

(*g*) As the witness made the search in the Bahamas, but left them in April, 1801, the search must have been before that time; the decision was in 1807.

(*h*) *Fitz v. Rabbits*, 2 M. & Rob. 60, Patteson, J.

(*i*) *Brewster v. Sewell*, 3 B. & A. 296. *Freeman v. Arkell*, 2 B. & C. 494, Bayley, J. And for further examples of sufficient searches, see *Rex v. North Bedburn*, Cald. 452. *Rex v. Johnson*, 7 East, 65. *Rex v. Morton*, 4 M. & S. 48. *Bligh v. Widdows*, 2 M. & S. 48.

400. *Rex v. East Farleigh*, 6 D. & R. 147. *Rex v. Stourbridge*, 8 B. & C. 96. *Pardoe v. Price*, 13 M. & W. 267.

(*j*) Per Alderson, B., *Gathercole v. Miall*, 15 M. & W. 319. In *Reg. v. Rastrick*, 2 Cox, C. C. 39, Platt, B., held that a label stating the amount of money in a parcel had not been sufficiently searched for, as the search had been only made at the owner's house, and not at his shop, and he could not say whether he saw the label last at his shop or at his house, though he had taken the parcel, usually, to his house.



was held that the search was sufficient. The presumption was either that the bankrupts had got them, or that they had got into the hands of some person to whom they were of no importance, who had destroyed them. (*k*)

Where a tithing-man went to a house to execute a warrant, and read the warrant under the window of the house, where the party who was to be apprehended under the warrant then was, and an affray then took place between the tithing-man and the inhabitants of the house, during which the tithing-man stated that he lost it; that he had it in his hand when he read it under the window; and that he never saw it afterwards; that he searched his pocket for it after he had gone about a mile and a half from the house, and could not find it; and that he directed a boy to look carefully for it, on the road between the house and the place where he first missed it; and the boy swore that he had made careful search, and could not find it; it was held, on a case reserved, that secondary evidence of the warrant was properly received, although notice had not been given to the prisoner to produce it. (*l*)

Loss of a warrant to apprehend.

But if it be proposed to give secondary evidence of a written instrument, and such instrument is traced into the possession of a particular person, the loss cannot be established without calling him as a witness; for it will not be enough to prove that he was applied to for the instrument, and upon such application said that he could not find the same, nor did he know where it was. Thus, where it was proved that an indenture of apprenticeship was of two parts, that one had been destroyed, and that the other had come to the hands of a Miss Taylor, who when asked for it said she could not find it; but she was not subpoenaed; this was held insufficient evidence of the loss. (*m*) So where an agreement for

What is not sufficient proof of loss.

(*k*) *Reg. v. Gordon*, Dears. C. C. 586.

(*l*) *Rex v. Hood*, R. & M. C. C. R. 281.

(*m*) *Rex v. Castleton*, 6 T. R. 236.

See also *Williams v. Younghusband*, 1 Stark. R. 139, and *Parkins v. Cobbett*, 1 C. & P. 282. In *Rex v. Denio*, 7 B. & C. 620, the pauper, who had served as an apprentice, proved that the indenture was kept by his master, and when the apprenticeship expired, he asked his master for the indenture, who said he had not got it, but that it was with the overseer of the parish by which the pauper was bound apprentice, and proof was given of search among the papers of the parish for the indenture, and that it could not be found; and that all the books and papers about that date were missing; and it was held, that as the master was living, and might have been called as a witness, and his declarations were clearly not admissible in evidence, there was not sufficient evidence to show that a due search had been made so as to let in parol evidence of the indenture. In *Rex v. Rawden*, 2 A. & E. 156, the widow of an apprentice stated that, a short time before her husband died, she asked him what had become of his indentures, and he said that he had got them away from his master after the end of his

apprenticeship, and had worn them in his pocket till they were all to pieces; and it was held that evidence of this conversation was inadmissible, there being no further proof either of the indenture having been in the possession of the apprentice, or of other inquiry after it. But where, in order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, and that upon application to the pauper, who was then ill, and died soon afterwards, to know what had become of it, he declared that when the indenture expired it was given to him, and he had burnt it long since; and it was also proved, that inquiry was made of the executrix of the master, who said that she knew nothing about it; it was held that this proof was sufficient to let in parol evidence of the contents of the indenture. *Rex v. Morton*, 4 M. & S. 48. The Court distinguished this case from *Rex v. Castleton*, inasmuch as there was no proof that the indenture ever existed in the possession of the pauper, unless his declaration were taken as evidence; and if it was, in the same breath he declared it no longer existed; whereas in *Rex v. Castleton* showed that a further search was necessary. An

renting a tenement had remained with the landlord, and he, being asked by a witness whether there was any such agreement, said, 'I cannot say for a certainty; I will search;' and told his clerk to search, which he and the witness did amongst the papers of the office, and could find no agreement; but the landlord was not examined; it was held that enough did not appear to show that the sessions were wrong in holding that the search was insufficient. It might be that the landlord's house was the proper place of deposit, and it had not been searched. If there had been proof *abunde* that the office was the proper place of deposit, the search would have been sufficient, though the landlord was not examined. (*n*) The same principle applies with respect to the person who has the legal custody of an instrument; if it is proposed to establish its loss for the purpose of giving secondary evidence of its contents, the person who has the legal custody of it should be called as a witness, or steps should be taken to make evidence of his conduct admissible. (*o*) So where there are two trustees of a settlement, a search for it by one of them is insufficient. (*p*) And where the instrument in question is the appointment to an office, the legal custody is in the officer, who is the person most interested in the instrument, and who requires its production as a sanction for those acts which he may be called upon to do under its authority. (*q*) If the individual to whose possession the instrument is traced be dead, an inquiry should be made of his executors, or such persons as must be presumed to have it in their possession. (*r*) But if the papers of the deceased were searched during his lifetime, it is unnecessary to apply to the executors or other persons to whose possession such papers may have come. (*s*) If two or more parts of a deed have been executed, the loss or destruction of all the parts must be proved, in order to lay a ground for admitting secondary evidence of its contents. (*t*)

The Court must be satisfied that due diligence has been used to find the document in question; but it is not necessary to negative every possibility; it is enough to negative every reasonable proba-

indenture of apprenticeship may be useful after the apprenticeship has expired, to entitle the party to the freedom of a corporation, or to exercise a trade, or it may be evidence of his settlement. Per Abbott, C. J., *Brewster v. Sewell*, 3 B. & A. 296. And there is no reason why the master should keep it after the apprenticeship is over, per Crompton, J., *Reg. v. Hinkley*, 3 B. & S. 885. The reasonable presumption, therefore, is that it would be in the custody of the apprentice; and it has been held that a search among his papers after his death was sufficient, without any search elsewhere. *Reg. v. Hinkley*, *supra*. But as an expired indenture sometimes remains with the master, per Maule, J., *Hall v. Ball*, 3 M. & Gr. 242, it would always be safer to search the master's papers also.

(*n*) *Reg. v. Saffron Hill*, 1 E. & B. 93.

(*o*) *Reg. v. Stoke Golding*, 1 B. & A. 173.

(*p*) *Doc d. Richards v. Lewis*, 11 C. B. 1035.

(*q*) *Rex v. Stoke Golding*, *supra*. The law presumes the appointment of overseers to be in the custody of some of the overseers, per Holroyd, J., *ibid*.

(*r*) 1 Phil. Ev. 456, 7th edit.

(*s*) *Rex v. Piddlehinton*, 3 B. & Ad. 460. The master of an apprentice took away the indenture after it was executed, and failed in business after the apprentice had served about a year. Upon the failure, an attorney had the custody of all the papers and books of the master, and looked over them after the failure, and did not find any indenture, and it was held that this was sufficient to allow the admission of secondary evidence, though the master's widow was living, and no inquiry had been made of her; for after the evidence of the attorney it was useless to inquire as to her possession of the indenture.

(*t*) *Bull. N. P.* 254. *Doxon v. Haigh*, 1 Esp. 409. *Alivon v. Furnival*, 4 Tyr.

Search should be with the person who has the legal custody.

Where two parts have been executed.

What is due search.

bility of anything being kept back. Where an officer or an attorney is applied to for the inspection of documents, the Court will assume, until the contrary appears, that the officer or attorney produces all the documents relating to the subject. (u) The search should be such as to induce the Court to come to the conclusion that there is no reason to suppose that the omission to produce the document itself arose from any desire to keep it back, and that there has been no reasonable opportunity of producing it which has been omitted, and the proper limit of the search is where a reasonable person would be satisfied that the party had *bond fide* endeavoured to produce the document itself. (v)

Whether there has been due search is a question to be determined by the Court; and any questions may be put for the purpose of showing that there has been a reasonable and *bond fide* search, though the answers to them may not be evidence in the ultimate question before the Court. (w) Therefore witnesses may prove what inquiries they have made of persons, who are likely to have a document in their possession, and what answers they received from them, though they are not called as witnesses. (x)

If in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were physically impossible. (y) Where, therefore, a witness proved that he had seen the signature of a person in a parish register, it was held that the witness might prove whose signature it was, although the register was not produced; for the person who had the custody of the register was not by law compellable to produce it, and, therefore, the identity of the party might be proved by showing that the signature was in his handwriting. (z)

And this rule will apply to documents in the possession of persons abroad, for their production cannot be enforced; still it seems that reasonable endeavours should be made to produce them.

Where a witness proved that, on his arrival at New York, the custom-house authorities took possession of all his papers, under a suspicion that he was the bearer of secessionist despatches, but ultimately all the papers were returned to him, except an agree-

Questions asked of persons likely to have a document and their answers are admissible.

Where the production of a document cannot be enforced, secondary evidence of its contents is admissible.

Documents abroad.

An agreement in America.

(u) *McGahey v. Alston*, 2 M. & W. 206. In this case a cheque, which had been drawn on the account of a parish, had been delivered to the paying clerk of the parish, and the bankers of the parish, on the same day, paid a cheque of the same amount, and their custom was to return the cheques when paid to the paying clerk. The cancelled cheques were kept in a room in the workhouse, used by the paying clerk as an office for that purpose, and application was made to the succeeding paying clerk for an inspection of the cheques he had in his office, and the paying clerk handed to the witness several bundles, which the witness looked through without finding the cheque in question, but looked at no other. The paying clerk was not called, and it was held that this was such reasonable search for the cheque as to induce parol evidence of it admissible.

(v) *Per Alderson, B. Gathercole v. Miall*, 15 M. & W. 319. *City of Bristol v. Wait*, 6 C. & P. 591.

(w) *Per Lord Campbell, C. J. Reg. v. Braintree*, 1 E. & E. 51.

(x) *Reg. v. Braintree, supra.* See *Reg. v. Kenilworth*, 7 Q. B. 642, where Coleridge, J., said, 'The preliminary proof is given to enable a judicial tribunal to determine whether secondary evidence can be submitted to them. In such a case a looser rule of evidence may prevail. The sessions were to make up their minds, not whether the document was destroyed or not, but whether there had been a *bond fide* search, and not mere carelessness and neglect, or fraud, in not producing it.'

(y) *Per Pollock, C. B. Sayer v. Glossop*, 2 Exch. R. 409.

(z) *Per Lord Campbell, C. J. Sayer v. Glossop, supra.*

ment which it was suggested had reference to the supply of goods for the confederates in America, and the witness had made repeated applications at New York for the agreement, but was told that it had been sent to Washington, and he had made no inquiry for it at that place; it was held that reasonable efforts had been made to procure the original, and that secondary evidence was properly received. (*a*)

Letter in  
France.

Where a Roman Catholic priest, shortly before a trial, went to Paris, and there saw in the possession of the Abbé Cognat a letter, in the handwriting of the defendant, and he asked the Abbé to let him have the letter in order to bring it to England, but the Abbé refused; it was held that the evidence given for the purpose of letting in secondary evidence was insufficient. It was nothing more than proof of a mere demand of the document apparently made by a stranger, who did not even disclose his purpose in making it. (*b*)

Disobedience  
to a subpoena  
*duces tecum*.

Where an overseer of a parish was duly subpoenaed to produce a rate-book, but neglected to attend the trial of an appeal between two other parishes, it was held that secondary evidence of the rate-book was inadmissible. (*c*)

In perjury.

We have seen that, on proof of the loss of a deposition in bankruptcy, secondary evidence may be given of its contents on a trial for perjury. (*d*)

2. Where the  
primary evi-  
dence is in the  
possession of  
the other  
party.

There is no distinction between criminal and civil cases with respect to secondary evidence of documents in the possession of the defendant. It has been solemnly determined, that notice may be given to the defendant in a criminal prosecution to produce a paper in his possession, and in case he neglects to produce it, other evidence may be given of it. (*e*) Where secondary evidence is sought to be given, on the ground that the primary evidence is in the possession of the adverse party, in the first place, the fact of such possession must be proved. The degree of evidence, which may be necessary to prove that fact, will depend so much on the nature of the transaction, and the particular circumstances of each individual case, that it is scarcely possible to lay down a general rule on the subject. (*f*) Where an original instrument belongs exclusively to a party, or regularly ought to be in his possession according to the course of business, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where the solicitor to a commission of bankruptcy proved that he had been employed by the defendant to solicit his certificate under the commission, and that, on looking at his entry of charges, he had no doubt the certificate was allowed, this was held sufficient proof of the certifi-

(*a*) *Quilter v. Jorss*, 14 C. B. (N. S.), 747.

(*b*) *Boyle v. Wiseman*, 10 Exch. R. 647. But Parke, B., said during the argument, "If it had been distinctly put to the Abbé Cognat, 'It is proposed to read this letter in evidence on the trial of an action for libel; will you allow it to be placed in my hands for that purpose?' and he had refused, perhaps that might have been sufficient to admit secondary evidence."

(*c*) *Reg. v. Llanfaethly*, 2 E. & B. 940. The grounds of this decision were,

that the overseer might be punished for disobeying the subpoena, and that there would be great liability to abuse, if the production of the evidence was dispensed with by the disobedience of the witness.

(*d*) *Reg. v. Milnes*, 2 F. & F. 10, ante, p. 88.

(*e*) *Per Buller, J., Rex v. Watson*, 2 T. R. 201. *Attorney-General v. Le Merchant*, 2 T. R. 201, note (*a*). *Cates v. Winter*, 3 T. R. 306.

(*f*) 2 Phil. Ev. 216.

cate having come to the defendant's possession. (g) Where an instrument has been delivered to a third party, between whom and the party to the suit there exists a privity, the possession of the privity is considered the possession of the party, for the purposes of letting in secondary evidence. Thus, in an action against the owner of a vessel, for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods which he had given to the captain was held sufficient to let the plaintiff into secondary evidence of the contents of the order, though the order itself appeared to be in the possession of the captain; on account of the privity between the owner and the captain. (h) So in an action of trover against the sheriff, a notice to the sheriff's attorney was, on account of the privity between him and his under-sheriff, held sufficient to let in secondary evidence of a writ, which was proved to have come to the possession of the under-sheriff by having been returned to him during the time the sheriff remained in office. (i) So notice to a defendant to produce a cheque drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, though the check remains in the banker's hands, for the possession of the banker is the possession of his customer. (j) So where a forged deed was produced by the prisoner's attorney on the trial of an ejectment, in which the prisoner was the lessor of the plaintiff, and after the trial it was returned to the prisoner's attorney, it was held that secondary evidence might be given of it, after notice to the prisoner to produce it, without calling the attorney to prove what he had done with the deed. (k)

Possession of privity.

In order to let in secondary evidence, the instrument need not be in the actual possession of the party; it is enough if it is in his power, which it would be if it were in the hands of a party, in whom it would be wrongful not to give up possession to him. But he must have such a right to it, as would entitle him not merely to inspect but to retain it. Where, therefore, a written contract had been deposited in the hands of the common agent of the defendant and the person with whom he had contracted, and notice to produce had been given to the defendant, it was held that secondary evidence was not admissible, because, even if the document were given to the defendant for the purpose of the

Where a party has a right to a document.

(g) *Henry v. Leigh*, 3 Campb. 502.  
(h) *Baldney v. Ritchie*, 1 Stark. N. P. C. 338. Reg. v. Barker, 1 F. & F. 326.

(i) *Taplin v. Atty.*, 3 Bing. 164.  
(j) *Partridge v. Coates, R. & M.* N. P. C. 156, per Abbott, C. J., S. P. *Burton v. Payne*, 2 C. & P. 520, per Bayley, J. See also *Sinclair v. Stevenson*, 1 C. & P. 582, where Best, C. J., held it was enough to trace the primary evidence to the possession of an agent. But there is no such privity between the defendant, and a third person under whom he justifies, so as to make proof of the possession of such third party equivalent to the possession of the defendant. *Evans v. Sweet, R. & M.* N. P. C. 88, per Best, C. J. And Lord Kenyon held, on the trial of an information for a libel,

that proof of the delivery of a paper to the servant of the defendant was not proof of the fact of the paper being in the defendant's possession, so as to let in parol evidence of its contents, upon notice to the defendant to produce it. *Rex v. Pearce, Peake*, N. P. C. 76; but see *contra*, *Pritchard v. Symonds*, Bull. N. P. 254. *Rosc. Ev.* 7, and Colonel Gordon's case, 1 Leach, 300, note (a) to Aickles's case.

(k) *Rex v. Hunter*, 4 C. & P. 128, Vaughan, B. Some counts of the indictment charged that certain persons made the deed, and that the prisoner fraudulently altered it, and it was objected that previously to the receiving secondary evidence the attesting witness ought to be called; but Vaughan, B., overruled the objection.

cause, it must be returned. (*l*) And where a paper is in the hands of a person acting in an independent character, and who has a right to the possession of it, notice to the party is insufficient; and this is so, although the party justifies under the authority of that person. (*m*)

Instrument once in the party's possession, but since parted with.

A letter which had been in the possession of the defendant was proved on the part of the defendant to be then filed in Chancery, pursuant to an order of that Court; Abbott, C. J., was of opinion, that the plaintiff, upon proof of notice to produce, was not entitled to give secondary evidence of the contents; for the letter was as much in the possession of the one party as the other. Either party might, on application to the Court of Chancery, have obtained permission to produce it. (*n*) But where a document was traced to the possession of the defendant, upon whom notice to produce it had been served, but he proved that it was then in the stamp-office (where it had been delivered to have some duties allowed), Best, C. J., held, that as he had not informed the plaintiff of that circumstance when serving the notice, secondary evidence was allowable. (*o*)

Notice to produce ;

its form.

After the possession of the primary evidence is proved to be in the adverse party, the party offering secondary evidence must prove that he has given notice to the other side to produce the primary evidence. Such notice may be by parol as well as in writing, and if both a parol and written notice have been given, proof of either is sufficient. (*p*) It should be properly entitled; (*q*) and must not be general, but should specify the document to be produced. Thus, a notice 'to produce all letters, papers, and documents touching a bill of exchange, mentioned in the declaration, and the debt sought to be recovered,' was held too vague. (*r*) So a notice 'to produce letters and copies of letters, also all books relating to the cause,' was held insufficient to let in secondary evidence of a letter alleged to have been written nine years before. (*s*) It should also be served in reasonable time. (*t*) In civil cases, the rule is, that notice to produce should be served before the commission day, when the party lives away from the assize town, in order that he may have an opportunity of bringing

When and upon whom to be served.

(*l*) Parry *v.* May, 1 M. & Rob. 279, Littledale, J.

(*m*) 2 Phil. Ev. 218, citing Evans *v.* Sweet, R. & M. 83. Rex *v.* Pearce, Peake, 76. Pritchard *v.* Symonds, B. N. P. 254. Whitford *v.* Tutin, 10 Bing. R. 395.

(*n*) Williams *v.* Munnings, 1 R. & M. N. P. C. 18.

(*o*) Sinclair *v.* Stevenson, 1 C. & P. 582.

(*p*) Smith *v.* Young, 1 Campb. 440. Rose. Ev. 7.

(*q*) Harvey *v.* Morgan, 2 Stark. R. 17, where in an action by the plaintiffs as the assignees of C. *v.* E., a notice to produce was entitled A. and B., assignees of C. and D. *v.* E., and held insufficient by Lord Ellenborough, though A. & B. were in fact the assignees of C. & D.

(*r*) France *v.* Lucy, R. & M. N. P. C. 341. Smith *v.* Sandeman, 2 Cox. C. C. 239.

(*s*) Jones *v.* Edwards, McClell. & Y. 139. In Morris *v.* Hauser, 2 M. & Rob. 392, Lord Denman, C. J., held a notice to produce 'all letters, written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf,' sufficient to let in secondary evidence of a letter. And in Jacob *v.* Lee, 2 M. & Rob. 33, Patteson, J., held a notice to produce 'all and every letters written by the plaintiff to the defendant relating to the matters in dispute in this action,' sufficient, and distinguished the case from France *v.* Lucy, and Jones *v.* Edwards, *supra*, on the ground that the notice mentioned the parties by whom and to whom the letters were addressed.

(*t*) As to what is considered a reasonable notice, see Doe *v.* Grey, 1 Stark. R. 283. Bryan *v.* Wagstaff, R. & M. N. P. C. 326. Drabble *v.* Donner, *ibid.* 47.

the paper required. (u) And, *a fortiori*, in a criminal case, where the party is in prison at a distance from his home, ought the notice to be served before the commission day. (v) And where on a trial at the assizes for arson, with intent to defraud an insurance company, a notice to produce the policy had been served on the prisoner about the middle of the day before the trial, and his residence, where the fire happened, was thirty miles from the assize town, the notice was held insufficient. (w) But no general rule can be laid down, as each case must depend on its particular circumstances. Where, therefore, a document was at the assize town, in the possession of an attorney, who had acted as attorney for the prisoner on a trial where the document was given in evidence, a notice served on the commission day was held sufficient. (x) In town causes, service of notice on the attorney in the evening before the trial is in general sufficient. (y) And on a trial for conspiracy, a notice to produce a cheque served at three o'clock in the afternoon of the day before the trial, at the office of the London agents for the country attorney of the

(u) *Trist v. Johnson*, 1 M. & Rob. 259, Park, J. A. J. S. P. *George v. Thompson*, 4 Dowl. P. R. 656, where it was served on the commission day, at 5 P.M., at the attorney's residence, after he had left home for the assize town. *Doe d. Curtis v. Spitty*, 3 B. & Ad. 182. *Hargest v. Fothergill*, 5 C. & P. 303, Taunton, J. In *Howard v. Williams*, 9 M. & W. 725, a notice was served on the defendant's attorney at his residence, twenty miles from the place of trial before the under-sheriff, at 8 P.M., on the night before the trial; the defendant resided in the same town with the attorney, but was not at home until 12 that night; and the notice was held insufficient.

(v) *Rex v. Ellicombe*, 1 M. & Rob. 260, Littledale, J. This was an indictment for setting fire to a house with intent to defraud an insurance company, and notice was served on the prisoner in gaol on Monday, the assizes having commenced on the Friday previous, and the trial being on the Wednesday following. The prisoner's residence was ten miles from the assize town. The notice was held insufficient.

(w) *Reg. v. Kitson*, Dears. C. C. 187.

(x) *Reg. v. Hankins*, 2 C. & K. 823, Coltman, J. In this case, on a trial for perjury, it appeared that about noon on the commission day at Hereford, the trial taking place the following morning, a notice to produce a paper (with reference to which the perjury was alleged to have been committed on a trial in the county court) was served in Hereford on Mr. Cadle, the present attorney of the prisoner. The prisoner lived at Ross, fourteen miles from Hereford, and Mr. Cadle lived at Newent, twenty-five miles from Hereford; but in the notice, further notice was given that the paper was then in Hereford in the possession of Mr. Minett, who was

then at the Green Dragon Hotel, and who had been the attorney for the prisoner at the trial in the county court, and who had previously been called upon under a subpoena *duces tecum* to produce the paper on this trial for perjury, and had been held not bound to produce it, on the ground that he held it as attorney for the prisoner; and Coltman, J., held that this notice was sufficient to let in secondary evidence of the contents of the paper. So where notice to produce certain policies of insurance was served on the attorney of the prisoner, on Tuesday evening, the prisoner being then at Maidstone, but not in custody, and the policies were twenty miles off, and the trial was on Thursday, and on the Wednesday the prisoner's attorney had sent a person to serve a subpoena at a place within four miles of where the policies were; Bramwell, B., held, that as there had been an opportunity of obtaining the policies, the notice was sufficient, and said that no general rule could be laid down, but every case must be governed by its particular circumstances. *Reg. v. Barker*, 1 F. & F. 326.

(y) *Per Gurney*, B., *Atkins v. Meredith*, 4 Dowl. P. R. 658. 2 Phil. Ev. 219. *Gibbons v. Powell*, 9 C. & P. 634, Gurney, B. *Leaf v. Butt*, C. & M. 451. *Meyrick v. Woods*, *ibid.* 452. But where notice to produce a receipt was served on the defendant on Saturday, the cause coming on for trial on the Monday, Gurney, B., held the service too late, and that the notice should have been served on the attorney. *Houseman v. Roberts*, 5 C. & P. 394. Where the party and his attorney both lived in Worcester, Williams, J., held that service on the Saturday during the assizes for the Monday following was sufficient. *Firkin v. Edwards*, 9 C. & P. 478.

defendants, who lived in Herefordshire, has been held sufficient. (z) And where a party has been served with a notice to produce sufficiently early to enable him to produce the document, it makes no difference that at the time of the service the case has been part heard. (a) But where in a town cause the service was at seven o'clock the evening before the trial, upon the attorney, who resided in London, between two and three miles from the tradesman, whose books were required to be produced, the Court of Exchequer held the notice insufficient, as the books could not be presumed to be in the possession of the attorney. (b) All these cases depend on their particular circumstances, and the question in each is, whether the notice was given in a reasonable time to enable the party to be prepared to produce the document at the time of the trial. (c) The notice may be served either on the party himself or his attorney. There is no difference in this respect between criminal and civil cases. (d) Where the defendant, an attorney, was indicted for perjury on the trial of an ejectment, in which he had acted as the attorney of the lessor of the plaintiff, and had produced a document and taken it back again, it was held that a notice to produce that document served on the defendant was sufficient, although he was not the attorney on the record in the ejectment. (e) And a notice served on a prisoner in gaol is sufficient. (f) So a notice served on a prisoner for one session of the Central Criminal Court has been held to be sufficient for a subsequent session, to which the trial had been postponed. (g)

Notice to produce when unnecessary.

The reason why notice to produce is required, is not to give the opponent notice that such a document will be used, so that he may be enabled to prepare evidence to explain or confirm it; (h) but it is merely to enable him to have the document in Court, to produce

(z) *Reg. v. Hamp*, 6 Cox, C. C. 167. Lord Campbell, C. J. The sheriff had seized the cheque in question in levying for a forfeited recognizance of one of the defendants, but this was held to make no difference.

(a) *Sturm v. Jeffree*, 2 C. & K. 442. Pollock, C. B. This cause began on Thursday, and at four o'clock was adjourned; before nine that evening the notice was served: all the parties lived in London. On Friday the hearing was resumed, and the document called for; and it was held that the notice was sufficient.

(b) *Atkins v. Meredith*, 4 Dowl. P. R. 658. In *Rex v. Haworth*, 4 C. & P. 254, Parke, J., held a notice to produce a forged deed served on the prisoner after the commencement of the assizes too late, saying it should have been served a reasonable time before the assizes; but it does not appear whether the prisoner resided in the assize town or not. See *Royston's case*, 1 Lew. 267.

(c) Per Alderson, B., *Lawrence v. Clark*, 14 M. & W. 250, where a notice dated the 12th of February was put into the letter-box of the plaintiff's attorney in London at half-past eight the evening

before the trial, which was on the 19th, but it was not shown whether the document was in the possession of the attorney or the plaintiff, who lived in London; and the notice was held insufficient.

(d) *The Attorney-General v. Le Merchaut*, 2 T. R. 201, in note (a) to *Rex v. Watson*. But it has been observed that the preceding case could not have been a case of felony, and that in felony a prisoner cannot appear by attorney (per Pollock, C. B., *Reg. v. Downham*, 1 F. & F. 386). As, however, an attorney may in fact be employed by a prisoner, it is clear that a notice served on an attorney so employed is good; but it is, of course, necessary to prove that the attorney is so employed. *Reg. v. Downham*, *supra*. *Reg. v. Boucher*, 1 F. & F. 486.

(e) *Reg. v. Phillpotts*, 5 Cox, C. C. 329, Erle, J. It was strongly urged, but in vain, that the document would be in the possession of the lessor of the plaintiff.

(f) *Reg. v. Robinson*, 5 Cox, C. C. 183. Pollock, C. B., and Erle, J.

(g) *Reg. v. Robinson*, *supra*.

(h) This was stated in 1 Stark. Ev. 404.



it, if he likes, and, if he does not, to enable the other party to give secondary evidence of it. It is merely to exclude the argument that the party desirous of proving the document has not taken all reasonable means to procure the original. (i) If, therefore, the document be in Court in the possession of the opponent, it may be called for, and if it be not produced, secondary evidence of it may be given. (j)

So notice to produce is unnecessary, when, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in actions of trover, for bonds or bills of exchange. (k) So in a prosecution for stealing a promissory note or other writing described in the indictment, parol evidence of the contents will be admissible, without any formal notice to the prisoner to produce the original. On an indictment for stealing a bill of exchange, all the judges held, that such evidence had been properly admitted, though it was proved that the bill had been seen, only a few days before the trial in a state of negotiation, in the hands of a third person, who had been served with a subpoena, and did not appear; (l) and if it had been proved to have been in the custody of the prisoner, parol evidence might have been given of its contents without notice to produce. (m) So on an indictment containing a count for stealing a post letter, the direction of which is stated in the count, the direction may be proved without any notice to produce; for the count gives sufficient notice. (n) So on an indictment for forging a note, which the prisoner afterwards got possession of and swallowed, Buller, J., permitted parol evidence to be given of the contents of the note, though no notice to produce it had been given. (o) But there it might be said, that such a notice would be nugatory, as the thing itself was destroyed. (p) On an indictment for forging a deed of release, it appearing that the prisoner had stated that after he had obtained possession of the deed he had burnt it, it was held that secondary evidence of its contents was admissible. (q) In *Layser's case*, (r) on an indictment for high treason, where it was proved, that the prisoner had shown a person a paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. So on the trial of an indictment for administering an unlawful oath, it was held that a

(i) Per Parke, B., *Dwyer v. Collins*, 7 Exch. R. 639.

(j) *Dwyer v. Collins*, *supra*, overruling *Cook v. Hearne*, 1 M. & Rob. 201. See *Doe v. Grey*, Stark. 283; *Roe v. Harvey*, 4 Burr. 2484. And the attorney may be called to prove that the document is in court, *ibid*.

(k) *How v. Hall*, 14 East, 274. *Scott v. Jones*, 4 Taunt. 865. *Tidd's Pract.* 853. The practice used to be otherwise, per *Gibbs, J.*, 4 Taunt. 868.

(l) *Aickles's case*, 1 Leach, 294.

(m) 1 Leach, 297, per *Heath, J.*

(n) *Reg. v. Clube*, 3 Jur. (N. S.) 698, *Pollock, C. B.*, who said, 'It is very common for a person to have on his garments labels stating his name and the date when

the garments were furnished by the tailor; suppose a coat with such a label were stolen, surely it would not be requisite to give a notice to produce the label.' *Reg. v. Fenton*, *post*, p. 344, note (u), was cited in this case. See *R. v. Farr*, 4 F. & F. 336. This case cannot be supported.

(o) *Spragge's case*, cited by Lord Ellenborough, C. J., in *How v. Hall*, 14 East, 276.

(p) Per Lord Ellenborough, C. J., *ibid*.

(q) *Rex v. Haworth*, 4 C. & P. 254, *Parke, J.* See *Foster v. Pointer*, 9 C. & P. 718. *Doe d. Phillips v. Morris*, 3 A. & E. 46.

(r) 6 St. Tr. 263, *De La Motte's case*. *Coram Buller*, 10 Heath, Js., 1 East, P. C. c. 2, s. 58, p. 124.

witness might prove that the prisoner read an oath from a paper, without giving him notice to produce it. (s) But an indictment for setting fire to a house, with intent to defraud an insurance office, does not convey such a notice that the policy of insurance will be required upon the trial, as to dispense with the necessity of a notice to produce it. (t) So where on an indictment for stealing iron out of a canal boat, it appeared that the boat had been weighed at a lock, and a ticket of the weight given to the prisoner, and it was proposed to give secondary evidence of its contents, although no notice to produce it had been given; Parke, J., held that this was not allowable, because the rule which requires notice to be given extends to criminal as well as civil cases, except where the nature of the indictment itself expressly shows the prisoner that the deed or paper in question will be wanted at the trial. (u) Upon an indictment for perjury in falsely swearing on a former trial that there was no draft of a statutory declaration, the materiality of the existence of such draft turned upon its contents, and the fact of certain alterations having been made in it. Parol evidence was admitted, not only of the fact of the existence of the draft, but of its contents and of alterations made in it, which were not in the declaration itself, without any notice to produce the draft having been given to the prisoner. Held, that such parol evidence of the draft and its contents was inadmissible, and that the nature of the indictment was not such as of itself to operate as a notice to produce, and the conviction upon such indictment was quashed. (v)

If a witness be sworn and has a document in his possession, he may be compelled to produce it, although he has not been served with a subpoena *duces tecum*; (y) and if a person be sworn, and decline to produce a document, which he has in Court, on any

(s) *Rex v. Moors*, 6 East, 419, note to *Rex v. Nield*. See also *Rex v. Hunt*, 3 B. & A. 566, *ante*, p. 329. And see the same case as to proving inscriptions on banners, &c., without notice to produce, *ibid*. So the principle of the rule requiring notice to produce does not extend to a case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as where a witness was called on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence was admitted, because the paper belonged to the witness, and had been secreted in fraud of the subpoena. *Leeds v. Cook*, 4 Esp. N. P. C. 256. *Tidd*, Pr. 853.

(t) *Reg. v. Kitson*, Dears. C. C. 187. *Rex v. Ellicombe*, 5 C. & P. 522. 1 M. & Rob. 260, *Littledale*, J.

(u) *Rex v. Humphries*, *Stafford* Sp. Ass. 1829, MS. C. S. G. See *Reg. v. Fenton*, cited 3 C. B. 760. On an indictment for larceny of a coat contained in a paper parcel, Parke, B., held that evidence of the direction of the parcel could

not be given without notice to produce it. *Sed quare*, and see the cases *ante*, p. 343. On an indictment against a son for stealing and a father for receiving boots and shoes, it appeared that a hamper which was alleged to have contained some of the articles had been sent by the son to the father, and it was proposed to prove how it was directed; but Maule, J., doubted whether the evidence was admissible, and thereupon it was withdrawn. *Reg. v. Hinley*, 2 Cox, C. C. 12, S. C., but not S. P., 2 M. & Rob. 524, Maule, J., said, 'The ground upon which the evidence may be admissible is the presumption that the direction does not exist; whereas there may not be the same reason for presuming that it is in existence. Therefore, unless you can show that it exists, it would appear that the evidence should be admitted.' 'Suppose an inscription on a bale marked "XX," would it be necessary to produce the bale?' According to the report in M. & Rob. the hamper had passed backwards and forwards between the son and father for several months. No authority was referred to in this case.

(v) *R. v. Elworthy*, 37 L. J. M. C. 3.

(y) *Snelgrove v. Stevens*, C. & M. 568, *Crasswell*, J.

lawful ground, secondary evidence may be given of its contents, though he has not been served with a subpoena *duces tecum*. (z)

A party called upon to produce a paper, must either produce it when called upon, or not at all: he cannot avail himself of it in a subsequent stage of the case. (a) Where, therefore, notice had been given to the defendant to produce certain receipts for rent, which he refused to produce; it was held, that he could not afterwards, as part of his case, put in the receipts for the purpose of showing that the rent was paid to the lessors of the plaintiff and another jointly. (b)

The document must be produced when called for.

Where a document is produced in consequence of a notice to produce, and it is alleged that the document is not the document in question, it is for the Court to decide whether it be so or not. (d) And where a document is called for after notice to produce, and some evidence is given to show that it is in the possession of one party, the other side is entitled at once to give evidence to prove that it is not in the possession or under the control of such party, and it is for the judge to decide this question. (e)

The court must decide whether the document is the right one, and in whose custody it is.

The regular time of calling for the production of papers and books is not until the party who requires them has entered into his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination as to their contents, although the notice to produce them is admitted. (f)

Time to call for production.

If upon a notice to the adverse party to produce primary evidence in his possession, he refuses to produce the instrument required, the other party who has done all in his power to supply the best evidence will be allowed to go into secondary evidence. (g) If the party, giving due notice, declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party, (h) though it is otherwise when the papers are inspected. (i) Secondary evidence of papers, to produce which notice has been given, cannot be entered into till the party calling for them has opened his case, before which time there can be no cross-examination as to their contents. (j) Where a party, after notice, refuses to produce an agreement, it is to be presumed as against him that it is properly stamped. (k)

Consequences of giving notice to produce.

(z) Doe d. Loscombe v. Clifford, 2 C. & K. 448. Alderson, B. See Doe Gilbert v. Ross, 7 M. & W. 102.

(a) 2 Phil. Ev. 220. Doe d. Higgs v. Cockell, 6 C. & P. 525. Jackson v. Allen, 3 Stark. R. 74. Lewis v. Hartley, 7 C. & P. 405.

(b) Doe d. Thompson v. Hodgson, 12 A. & E. 135; 2 M. & Roh. 282.

(d) Harvey v. Mitchell, 2 M. & Rob. 366. In Froude v. Hobbs, 1 F. & F. 612, Byles, J., with the consent of the parties, left the question to the jury whether a book produced was the book in which the terms of a contract had been entered. But this was only to assist him in deciding the question.

(e) Harvey v. Mitchell, 2 M. & Rob. 366, Parke, B. If a defendant interposes such evidence, it does not give any right to the plaintiff to reply, as it is given

merely for the purpose of enabling the judge to decide the question.

(f) 2 Phil. Ev. 222. Graham v. Dyster, 2 Stark. R. 23. Sideways v. Dyson, *ibid.* 49. 1 Stark. Ev. 403.

(g) Cooper and another v. Gibbons, 3 Campb. 363.

(h) Sayer v. Kitchen, 1 Esp. N. P. C. 210.

(i) Wharam v. Routledge, 5 Esp. N. P. C. 235. Rosc. Ev. 9, S. P., if they are at all material to the case, Wilson v. Bowie, 1 C. & P. 10, Park, J. A. J. Calvert v. Flower, 7 C. & P. 386. See Smith v. Brown, 2 Cox, C. C. 278.

(j) Graham v. Dyster, 2 Stark. 23. Rosc. Ev. 9.

(k) Crisp v. Anderson, 1 Stark. N. P. C. 35, but the party refusing is at liberty to prove the contrary *ibid.*

3. What is good secondary evidence.

Of a deed : Original instrument must be proved to have been duly executed.

No degrees of secondary evidence.

Of a letter,

Of an affidavit of ownership of ship.

3. It remains to be considered what is good secondary evidence. (*l*) It must be observed that, previous to giving any such evidence of the contents of a deed, the original deed ought to be proved to have been duly executed. (*m*) Where the sessions found that B. was the attesting witness to a lost indenture of apprenticeship, it was held that evidence of his handwriting was unnecessary ; for the proof of handwriting could only be required to establish the identity between the deceased and the attesting witness. (*n*) So where an original note of hand is lost, a copy cannot be read in evidence unless the note is first proved to be genuine. (*o*) In secondary evidence there are no degrees, that is, no precedence or superiority in point of admissibility. An attested copy of a written instrument is not of a superior order of proof to an examined copy, nor is an examined copy superior to parol evidence of the contents. (*p*) As soon, therefore, as a party has accounted for the absence of the original document, he is at liberty to give any kind of secondary evidence. (*q*) A copy of a document taken by a machine which was worked by the witness who produces it, is good secondary evidence, though it was not compared with the original. (*r*) So a document sent by the plaintiff to the defendant with a letter stating it to be a copy of a deed, is evidence against the plaintiff, though notice to produce the deed has been given, and the deed is not called for. (*s*) But a paper delivered as a copy of a deed from the office of an attorney, but which he states he is unable of his own knowledge to vouch to be a copy, is insufficient. (*t*) The evidence of any one who recollects the contents of a letter is good secondary evidence of them, (*u*) although it is in the party's power to produce the clerk who wrote the letter. (*v*) Where it was proposed to prove that defendant was owner of a ship, by means of his affidavit, sworn for the purpose of obtaining

(*l*) *Fisher v. Samuda*, 1 Campb. 193.

(*m*) Bull. N. P. 254. *Rex v. Culpepper*, Skin. 673.

(*n*) *Reg. v. St. Giles*, 1 E. & B. 642, 22 L. J. M. C. 54. Erle, J., said, 'In no case whatever when the instrument is lost, and the attesting witness is dead, can it be necessary to prove his handwriting.' But Wightman, J., thought it not necessary to determine whether proof of such handwriting was indispensable ; and Crompton, J., thought there might be cases where it might be necessary to prove such handwriting.

(*o*) By Lord Hardwicke, C. J., in *Goodier v. Lake*, 1 Atk. 246.

(*p*) 2 Phil. Ev. 236. Bull. N. P. 254, *Munn v. Godbold*, 3 Bing. 292. *Rhind v. Wilkinson*, 2 Taunt. 237. *Eyre v. Palsgrave*, 2 Campb. 605.

(*q*) Per Parke, B., *Doc d. Gilbert v. Ross*, 7 M. & W. 102. In that case on the trial of an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and it was held that the shorthand writer's notes of the contents of the deed were admissible in evidence, although there was an attested copy, which being unstamped was rejected. In *Brown v. Woodman*, 6 C.

& P. 206, Parke, J., held that parol evidence of the contents of a letter was admissible, although a copy of the letter existed. See *Doe d. Morse v. Williams*, C. & M. 615. In *Hall v. Ball*, 3 M. & Gr. 242, in trover for an expired lease by the lessor, the lease or counterpart executed by the lessor not being produced by the defendant upon notice, it was held that the lessor might give parol evidence of the contents without producing the counterpart executed by the lessee. And see *Newton v. Chaplin*, 10 C. B. 356.

(*r*) *Simpson v. Thornton*, 2 M. & Rob. 433, Maule, J.

(*s*) *Ansell v. Baker*, 3 C. & K. 145. This decision, perhaps, rather rests on the ground that the plaintiff had admitted the existence of such a deed, and that such admission was evidence against him independently of the notice to produce ; still it was an admission of the correctness of the copy.

(*t*) *Volant v. Soyer*, 13 C. B. 231.

(*u*) *Liebman v. Pooley*, 1 Stark. N. P. C. 167, by Lord Ellenborough. But a copy of the original copy of a letter is not good secondary evidence, *ibid*.

(*v*) *Rex v. Chadwick*, 6 C. & P. 181, Tindal, C. J.

a certificate of register, and a proper ground for the reception of secondary evidence had been laid; Lord Ellenborough held, that an entry in the register-book at the custom-house, stating that the certificate had been granted on an affidavit of the defendant that he was owner, was not admissible as secondary evidence. The collector's clerk, or some person who had seen the affidavit, and knew that it was made by the defendant, ought to have been called. (w) Where there are two parts of a written agreement, both executed at the same time, the one stamped and the other unstamped, the unstamped part, upon being proved to be correct by a witness, is admissible as secondary evidence of the contents of the stamped part. (x) So where there was a properly stamped agreement under seal, and a counterpart of it unstamped, and the plaintiff proved the loss of the deed itself, and proposed to read a draft copy in evidence, it was held that the unstamped counterpart, which was produced after notice by the defendant might be read as secondary evidence of the contents of the lost deed. (y)

Of lost agreement, &c., by unstamped counterpart.

There are some particular cases, where the rule that the best possible evidence must be produced has been relaxed. Where it is necessary to prove an entry in a public book, the original book need not be shown; but from a principle of general convenience, an examined copy will be admitted. (z) The post-office marks in town or country, proved to be such, are evidence that the letters, on which they are, were in the office to which those marks belong at the dates those marks specify; (a) but a mark of double postage on such a letter is not in itself evidence that the letter contained an enclosure, (b) and it has been held that the post-mark is not evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such post-mark. (c) The muster-books of the King's ships, documented in the navy office, to which returns are regularly made, by the commanders, of the names, &c., of their respective crews, may be admitted as evidence of the persons therein named having served on board the several ships in the capacity there mentioned. (d) So in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments; (e) and that even in a case of murder. (f) A witness may be examined on the *voire dire* as to the contents of a written instrument, without notice having been given to produce it. (g) And where a witness is cross-examined for the purpose of impeaching his credit, such cross-examination is sometimes allowed

Cases where the rule is relaxed.

Public books.

Post-office marks.

Muster-books.

Persons acting in a public capacity.

On the *voire dire*.

On cross-examination to impeach a

(w) *Teed v. Martin*, 4 Campb. 90.  
(x) *Waller v. Horsfall*, 1 Campb. 501.  
(y) *Munn v. Godbold*, 3 Bing. 292.  
See also *Garnons v. Swift*, 1 Taunt. 507.

(z) 1 Phil. Ev. 432.  
(a) *Rex v. Plumer*, Russ. & Ry. 264.  
*Ante*, p. 220.

(b) *Ibid*.  
(c) *Rex v. Watson*, 1 Campb. 215.  
*Ante*, p. 222, and *Fletcher v. Braddyll*, 3 Stark. N. P. C. 64.

(d) *Ante*, vol. 2, p. 803, *Rhodes's case*, 1 Leach, 24. And see *Aickles's case*, 1 Leach, 390, where it was held that the

daily book of a prison is good evidence to prove the time of a prisoner's discharge.

(e) 1 Phil. Ev. 432. *Ante*, p. 327.  
(f) By *Buller, J.*, in *Berryman v. Wise*, 4 T. R. 366.

(g) *Howell v. Locke*, 2 Campb. 15. 'An examination on the *voire dire* is for the purpose of establishing something of which the court is to be the judge and not the jury; it may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury.' See *Macdonnell v. Evans*, 11 C. B. 930.

witness's  
credit.

Rule applies  
only to proof  
of the issue, or  
of some fact  
material to the  
issue.

Statements  
respecting  
writings.

Fact of  
tenancy.

Facts of ser-  
vice.

to be conducted without regard to the rule under consideration. As to questioning a witness whether he has been convicted of a felony or misdemeanor, without producing the conviction, see *post*. As to asking a witness on cross-examination, for the purpose of trying his credit and veracity, whether he has not given an account in writing different from his present testimony, without producing the writing itself, see *post*. It seems that the general rule, that the best evidence is to be produced which the nature of the thing admits, is to be understood as applying only to the proof of the issue, or of some fact material to the issue. (*j*)

Whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing. (*k*) The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is that they are not open to the same objection which belongs to parol evidence from other sources where the written evidence might have been produced, for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so. (*l*) And such an admission is legal evidence, not as secondary evidence of the contents of a written instrument, but as original evidence. (*m*) And the principle is the same, whether the admission is by words or by acts: and a man may by his acts make an admission as clearly and as much in detail as he possibly could by words. (*n*)

If the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question. (*o*) But if any of the terms of the tenancy, as, for example, who is the lessor, or what is the rent, or what rent is due, (*p*) are in issue, and it appears that there was a written contract for the tenancy, such contract must be produced (*q*) But the statements made by a tenant of the terms upon which he is actually holding the premises, are admissible against him in order to prove the terms of his tenancy, though the tenancy was created by adopting the terms of a former demise in writing. (*r*)

So the fact that a person is employed as a servant under a written agreement may be proved without its production, but not the terms of it. (*s*)

(*j*) Ibid. 301, 7th ed. See *Henman v. Lestor*, 31 L. J. C. P. 366.

(*k*) Per Parke, B., *Slatterie v. Pooley*, 6 M. & W. 664. *Tupper v. Folkes*, 9 C. B. (N. S.) 797.

(*l*) Per Parke, B., *Slatterie v. Pooley*. *Erle v. Picken*, 5 C. & P. 542, Parke, B.

(*m*) Per Patteson, J., *Reg. v. Basingstoke*, 14 Q. B. 611.

(*n*) Per Coleridge, J., *ibid*. In this case it was held that the payment of relief to a pauper whilst resident in one parish by the overseers of another parish for several years, after a threat by the

overseers of the former parish to remove the pauper, unless a certificate was obtained, was an admission that a certificate had been obtained.

(*o*) Greenl. Ev. 100. *Rex v. The Holy Trinity, Kingston-upon-Hull*, 7 B. & C. 611; 1 M. & R. 444.

(*p*) *Augustien v. Challis*, 1 Exch. R. 279.

(*q*) *Rex v. Rawden*, 8 B. & C. 708. *Rex v. Merthyr Tidvil*, 1 B. & Ad. 29. *Doe v. Harvey*, 8 Bing. R. 239.

(*r*) *Howard v. Smith*, 3 M. & Gr. 255. (*s*) *Reg. v. Duffield*, 5 Cox, C. C.

Inscriptions on walls, and fixed tables, mural monuments, grave-stones, surveyors' marks on boundary trees, as they cannot be conveniently produced in court, may be proved by secondary evidence. (t) Such exceptions are in cases where the material on which the document is written is not easily removed; as in the case of things fixed to the ground or to the freehold, for the law does not expect a man to break up his freehold for the purpose of bringing a notice into court. But that ground of exception does not apply to the case of a notice painted on a board, fastened by a string to a nail in a wall, as there could be no difficulty or inconvenience in removing the board from the nail on which it was hung, and producing it in court. (u) Where on an indictment for murder, the point was very much argued whether the inscription on a coffin-plate could be given in evidence without producing the coffin-plate itself, Maule, J., held that it could not, because the presumption was that it was in existence. (v).

Inscriptions on walls, &c.

On an indictment for bigamy, it has been held that a photograph taken from the prisoner, who said it was that of her first husband, might be shown to a witness, and he might be asked whether it represented the man, whom he had seen married. (w)

Photograph.

### SEC. III.

#### *Of Hearsay Evidence.*

There is no rule in the law of evidence more important or more frequently applied than the general one, that hearsay evidence of a fact is not admissible. If any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth; and the reason of the rule is, that evidence ought to be given under the sanction of an oath, and that the person who is to be affected by the evidence may have an opportunity of interrogating the witness as to his means of knowledge, and concerning all the particulars of his statement. (x)

General rule that hearsay evidence is inadmissible.

And the same rule applies to the written statements of either living or deceased persons. Where, therefore, after the death of one Stuart, a tin case containing papers was delivered by a servant to their master; and one of these papers was indorsed in Stuart's handwriting, 'My own private affairs,' and it contained a paper purporting to be a certificate of the minister and elders of the kirk session at Canongate in Edinburgh, and given by them to Stuart. It was usual for the minister and elders of the kirk session, when a person left the congregation to give a certificate to enable him to be admitted into any other congregation. A book containing the minutes of the kirk session of their transactions was also

And so also are written statements.

404. Reg. v. Rowlands, 5 Cox, C. C. 415 (b).

(t) Greenl. Ev. 106, citing Doe d. Coyle v. Cole, 6 C. & P. 359, Patteson, J. Rex v. Fursey, 6 C. & P. 81.

(u) Jones v. Tarleton, 1 Dowl. P. R. (N. S.) 625, 9 M. & W. 675.

(v) Anonymous, stated by Maule, J., in Reg. v. Hinley, 1 Cox, C. C. 12.

(w) Reg. v. Tolson, 4 F. & F. 193, Willes, J.; who said, 'The photograph

was admissible, because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person, or the object it represents; and, therefore, is in reality only another species of the evidence, which persons give of identity when they speak merely from memory.'

(x) 1 Phil. Ev. 229, 7th ed.; 206, 9th

produced, and the session clerk of Canongate was called to prove that he had learnt the handwriting of the parties who had signed the certificate by looking at the minutes in the book. It was objected that the witness could not be permitted to look at the book in order to become acquainted with the handwriting therein; 2nd, that the book itself was not evidence, and could not be used for any purpose; 3rd, that the certificate itself would not be evidence even if the signatures to it were proved; 4th, that as the servant who delivered the papers to the master was not called, there was no proof that the certificate had ever been in Stuart's possession; 5th, that the indorsement on the paper containing it was inadmissible, and that all it showed was that one paper had once been in his presence; and it was held that the certificate was inadmissible. (y)

There are, however, certain instances, which it will be the object of this section to point out, where hearsay evidence is admissible, because either the objection does not apply, or from the necessity of the case the rule is relaxed.

Where words amount to acts.

Many things which pass in words only are really acts, and are therefore admissible. Such are all contracts by parol. So is a claim to land or goods. (z) So directions given by words are admissible. (a)

Hearsay part of the transaction, or *res gestæ*.

When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, it is then admissible; for to exclude it might be to exclude the only evidence of which the nature of the case is capable. (b) Thus in *Lord George Gordon's* case, on a prosecution for high treason, it was held that the cry of the mob might be received in evidence as part of the transaction. (c) And, generally speaking, declarations accompanying acts are admissible in evidence as showing the nature, character, and object of such acts. (d) Thus, where a person enters into land in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin, or the like; (e) or changes his actual residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or, in fine, does any other act material to be understood; his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as 'verbal acts indicating a present purpose and intention,' and are therefore admitted in proof like any other material facts. They are part of the *res gestæ*. (f) Thus, where a constable, who

(y) *Reg. v. Barber*, 1 C. & K. 434. *Gurney, B., Williams, J., and Maule, J.* The statement in the text is more accurate than that in C. & K. The judges did not intimate the ground on which the certificate was inadmissible.

(z) *Ford v. Elliott*, 4 Exch. R. 78. *Rolfe, B.*, 'A claim may be manifested by words as well as acts. Whether it be by words or otherwise seems to me to be perfectly immaterial.' *Alderson, B.*, 'If I were to say "Take these goods away," and put them into your hand, that would clearly be an act.'

(a) *Reg. v. Wilkins*, 4 Cox, C. C. 92, where Erle held that a witness might

prove that he made inquiries, and in consequence of directions given him in answer to those inquiries he followed the prisoners until he apprehended them.

(b) *Rosc. Ev.* 30.

(c) 21 How. St. Tr. 535.

(d) 1 Stark. Ev. 51, 87, 88, 89.

(e) *Co. Litt.* 49 b, 245 b. *Robinson v. Swett*, 3 Greenl. 316. 3 Bl. Com. 174, 175.

(f) *Greenl. Ev.* 120, citing *Bateman v. Bailey*, 5 T. R. 512. *Rawson v. Haigh*, 2 Bingh. R. 99. *Newman v. Stretch*, M. & M. 338. *Ridley v. Gyde*, 9 Bing. 349. *Smith v. Cramer*, 1 Bing. N. C. 585. *Gorham v. Cantou*, 5 Greenl. 266.



was indicted for a forcible entry into a house, had searched the house, having a warrant in his hand, Lord Tenterden, C. J., held that what he said at the time as to who he was searching for, was admissible, although the question was asked by his counsel, and the answer might be in his favour. (f) But where the prisoner, who was indicted for burning a bible, had employed some boys to take books to a place where they were burnt by his direction, it was held that what a person, who first appeared when the burning was going on, said at the time he tore up a book and threw it into the fire was not admissible, as there was no common object proved between him and the prisoner. (g)

Upon an indictment for the murder of Harriet Louisa Lane, a witness, named Ellen Willmore, was called. The witness was the person who had last seen Harriet Louisa Lane on the afternoon of the 11th of September, 1874, when the latter left her lodgings at 3, Sydney Square, Mile End. After that date Harriet Louisa Lane was not seen again alive, and that was the date fixed upon by the prosecution as the time when the murder was perpetrated. The witness, having described what occurred at the parting between her and Harriet Louisa Lane on that afternoon, was asked whether Harriet Louisa Lane, at the time of her departure from the house, made a statement to her. In answer to an objection made by the prisoner's counsel to a question which he anticipated would follow upon this, Cockburn, C. J., said, 'All that is proposed to ask now is the question, "When going away did she make a statement?" That question can be put, but not the question, "What statement did she make?"' The question at present only goes to the extent of ascertaining whether a statement was made, and there it stops; but I agree that if it went further, to the extent of inquiring what was the statement, it would be inadmissible. You are constantly meeting with such a question, "Did so-and-so make a statement to you, and, in consequence of that communication, did you do anything?" The fact that some statement was made is undoubtedly admissible.' The Attorney-General, who appeared for the prosecution, then said, 'The woman is leaving her house when she makes a statement, which is a declaration of intention, and it is submitted that that is a statement accompanying an act. It is part of the act of leaving, and on that ground it is proposed to ask the question to which objection has been made. Cockburn, C. J., 'It was no part of the act of leaving, but only an incidental remark. It was only a statement of intention, which might or might not have been carried out. She would have gone away under any circumstances. You may get the fact that on leaving she made a statement, but you must not go beyond it.' (gg)

Fellowes v. Williamson, M. & M. 306.  
Vacher v. Cocks, M. & M. 353, 1 B. & Ad. 145.

(f) Rex v. Smyth, 5 C. & P. 201. And see 1 Stark. Ev. 62, 350, 351. Walters v. Lewis, 7 C. & P. 344. Where an agent paid money into a bank, Littledale, J., held that what he said about the money at the time he paid the money into the bank was admissible. Reg. v. Hall, 8 C. & P. 358. The learned judge admitted the evidence, on the ground that it was a declaration by an agent acting within

the scope of his authority; but it seems equally admissible, as a declaration accompanying the act of payment, and explanatory of the purpose of the payment. C. S. G. See R. v. Edwards, 12 Cox, C. C. 230.

(g) Reg. v. Petcherini, 7 Cox, C. C. 78, Crampton, J., and Greene, B. It seems clear that the acts of the person were inadmissible on the same ground.

(gg) Reg. v. Wainwright, 13 Cox, C. C. 171, Cockburn, C. J. A similar objection to the above was taken to certain

Complaints of injuries.

In an action by a husband and wife for wounding the wife, Lord C. J. Holt allowed what the wife said immediately upon the hurt received, and before she had time to devise anything for her own advantage, to be given in evidence as part of the *res gestæ*. (*h*) So on an indictment for manslaughter, in killing a party by driving a cabriolet over him, it has been held that a statement made by the deceased immediately after the accident, as to the cause of the accident, is admissible. (*i*) And Lawrence, J., said, in *Aveson v. Lord Kinnaird*, (*j*) that it is in every day's experience, in actions of assault, that what a man has said of himself to his surgeon is evidence to show what he suffered by the assault. Inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time; and what were the symptoms, what the conduct of the party themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. (*k*) So a conversation as to the state of the health of a deceased person, between him and a witness, is admissible to prove that he was in good health at the time. (*l*) So on a prosecution for robbery, it has been held, that the fact of the party robbed making a complaint to a constable shortly after the robbery, and mentioning the name of a person, as the name of one of the persons who had robbed him is admissible, but not the name so mentioned. (*m*) So on a

Robbery and rape.

evidence of a like kind preferred on behalf of the prosecution in the case of *Reg. v. Pook*, tried before Lord Chief Justice Bovill, at the Old Bailey Sessions, on the 15th of July, 1871, and reported in the Sessions Paper of that date. There the prisoner was charged with the wilful murder of Jane Maria Clousen. The murder was committed on the night of the 25th or the morning of the 26th of April, 1871, at Eltham. The deceased was discovered in a dying state in Kidbrooke Lane. She had lived in the prisoner's family, and suspicion attached to him. One of the witnesses, Fanny Hamilton, who was called by the prosecution, proved that for ten days prior to the 25th of April the deceased had lodged in her house, that on the evening of that day she went out in her company, and that after walking about for some time they parted, when the deceased told her where she was going. It was proposed by the counsel for the prosecution to ask the question, 'What did she say to you?' To this the counsel for the prisoner objected, on the ground that whatever was said was said in the prisoner's absence, and he had no means of cross-examining upon it. It was thereupon contended by the counsel for the prosecution that it was a declaration so far accompanying the act itself as to render it part of the *res gestæ*, and he cited in support of his contention the case of *Hardley v. Carter*, reported, 8 New Hampshire Reports, American Reports; and at the termination of the argument the Lord Chief Justice refused to permit the ques-

tion to be put. See 13 Cox, C. C. 172, note.

(*h*) *Thompson v. Trevanion*, Skin. 402, cited by Lord Ellenborough, C. J., in *Aveson v. Lord Kinnaird*, 6 East, 193.

(*i*) *Rex v. Foster*, 6 C. & P. 325, Park, J. A. J., Patteson, J., and Gurney, B.

(*j*) 6 East, 193. 1 Phil. Ev. 191.

(*k*) By Lord Ellenborough, C. J., 6 East, 195. 'When a patient enters into a history of his complaint, and relates some earlier symptoms experienced at a former period, he is giving a narrative from memory rather than yielding to the impressions forced upon him by his situation; and it would seem, upon principle, that what he (so) says ought not to be received in evidence.' 1 Phil. Ev. 191. And 'although it is now settled that what a patient says to a medical man about his sufferings is receivable in evidence, it should seem that a statement by him respecting the particular cause of his sufferings (as, for example, the circumstance of an assault which he had received) would be open to greater objection.' 1 Phil. Ev. 192.

(*l*) *Reg. v. Johnson*, 2 C. & K. 354. A complaint by a deceased child of being hungry, made in the absence of the prisoners, was admitted in evidence. *R. v. Conde*, 10 Cox, C. C. 547. This was an indictment for withholding necessary food from a child whereby he died.

(*m*) *Rex v. Wink*, 6 C. & P. 397, Patteson, J. It was also held that the constable might be asked whether in con-

prosecution for a rape, it has been held that the prosecutor may prove that the woman made a complaint recently after the injury: (n) so it has also been considered allowable, on an indictment for an assault on an infant of five years old, with intent to ravish her, to give evidence of the child's having complained of the injury recently after it was received. (o) But the particulars of such a complaint are not admissible in evidence on the part of the prosecution. (p) It is not, therefore, competent, on the part of the prosecution, to ask what name the prosecutrix mentioned at the time she made such a complaint. (q) And although what the prosecutrix said at the time of the committing the offence would be receivable in evidence, on the ground that the prisoner was present, and the violence going on, yet, if the violence was over, and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence. (r)

The fact of the prosecutrix having made a complaint is only admissible for the purpose of confirming her testimony; in case, therefore, of her death, or absence from any cause, neither the particulars of the complaint, nor the fact of such complaint having been made, are admissible in evidence. (s)

On a charge of larceny, where the proof against the prisoner is, that the stolen property was found in his possession, it would be competent to show, on behalf of the prisoner, that a third person left the property in his care, saying he would call for it again afterwards; for it is material in such a case to inquire under what circumstances the prisoner first had possession of the property. (t)

Where a witness had had a conversation with a prisoner about arsenic, but could not fix the time when this happened, it was held that an observation respecting this conversation made by the witness after the prisoner left to a person in the shop at the time, might be proved by that person, in order to fix the time when the conversation took place. (u) Where a prosecutor had

Conversation admitted to fix a date,

sequence of the prosecutor mentioning a name to him, he went in search of any person, and who that person was; but in *Reg. v. Osborne*, C. & M. 622, this point was questioned by Cresswell, J., who said, 'It seems to me to be rather too refined a distinction to prevent the name from being mentioned, and yet to permit it to be asked whether in consequence of what was said the witness apprehended a particular person. I think you ought not to go so far as that.' But where, on a trial for murder, it was proved that a shout was heard, and a witness went out of her house and saw the deceased, who seemed very weak and injured, and the moment she came up to him she asked him what was the matter; Monahan, C. J., held that the witness might add, 'he said he was robbed by the man who walked with him from the cross roads,' on the ground that this was part of the *res gestæ*. *Reg. v. Lunny*, 6 Cox. C. C. 477. This case deserves reconsideration. See vol. 1, p. 867.

(n) *Rex v. Clarke*, 2 Stark. N. P. C. 242. Such evidence is now considered quite essential in order to support the statement of the prosecutrix. C. S. G.

(o) 1 East, P. C. c. 10, s. 5, p. 444. Vol. 1, p. 874.

(p) 1 Phil. Ev. 193, vol. 1, p. 867, note (c).

(q) *Reg. v. Osborn*, C. & M. 622, Cresswell, J. But the counsel for the prisoner may, if he thinks fit, ask the prosecutrix as to the terms of the complaint, and if he does so, the counsel for the prosecution has a right to examine as to all that was said by her in the same conversation. C. S. G.

(r) Per Cresswell, J., *Reg. v. Osborne*, *supra*.

(s) *Reg. v. Megson*, 9 C. & P. 420, Rolfe, B. *Reg. v. Guttridge*, 9 C. & P. 471. Parke, B., vol. 1, p. 868; 1 Phil. Ev. 193.

(t) 1 Phil. Ev. 234, 7th ed.

(u) *Reg. v. Richardson*, 1 Cox, C. C. 361. Lord Denman, C. J., and Alderson, B.

to explain  
conduct.

for three days concealed a burglary committed in his house, fearing the vengeance of the prisoners; Erle, J., held that his wife might prove that 'he told me not to tell of it; he said he was out late at night with his horses, and should not be safe;' for conversations that explain a man's conduct are admissible in evidence. (v)

Testimony of  
a deceased  
witness at a  
former trial.

If there had been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness given upon oath at the former trial is admissible on the subsequent trial, and may be proved by one who heard him give evidence; (w) but the witness must speak to the very words, and not merely swear to the effect of them. (x) 'He ought,' said Lord Kenyon, 'to recollect the very words; for the jury alone can judge of the effect of words.' (y) In what cases the depositions of a witness before a committing magistrate may be read in evidence at the trial, will be hereafter considered.

Depositions.

Dying declara-  
tions in cases  
of homicide.

Besides the usual evidence of guilt in general in cases of felony, there is one kind of evidence peculiar to the case of homicide, which is the declaration of the deceased after the mortal blow as to the fact itself, and the party by whom it was committed. (z) The general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope in this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. (a) It is therefore evident that declarations, though proved to have been made by a person in a dying state, are not admissible, unless it also appears that the deceased himself apprehended that he was in such a state of mortality as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions. (b) 'It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were *made under a sense of impending death*; (c) but

The declara-  
tions must be  
made under a  
sense of im-  
pending death.

(v) Reg. v. Glandfield, 2 Cox, C. C. 43.

(w) Rex v. Carpenter, 2 Show. 47; 2 Hawk. P. C. c. 46, s. 29; 1 Phil. Ev. 337; and Mr. Starkie's note to Rex v. Smith, in the second volume of his Reports, p. 211.

(x) Lord Palmerston's case, cited by Lord Kenyon in Rex v. Jolliffe, 4 T. R. 290.

(y) Ennis v. Donisthorpe, MS. 1 Phil. Ev. 231, 7th ed. By this it is conceived his lordship meant, not that the witness's testimony would go for nothing, unless he could swear positively they were the very words used by the deceased, and no other; but that the present witness ought to say, 'To the best of my recollection these were the very words used.'

(z) 1 East, P. C. c. 5, s. 124, p. 353.

(a) Per Eyre, C. B., in Woodcock's case, 1 Leach, 500.

(b) Per Eyre, C.

(c) R. v. Forester, 10 Cox. C. C. 368, 4 F. & F. 857. Smith's case, 1 Lew. 81. Ashton's case, 2 Lew. 147. Minton's case, 1 M'Nally, Gr. 386. R. v. Howell, 1 Den. C. C. 1; 1 C. & K. 689, where per Lord Denman, C. J., 'We all think the case beyond all doubt. Danger existed. The deceased clearly thought he was dying, and had no hope of recovery. There is no ground for holding his declaration inadmissible. R. v. Thomas, 1 Cox, C. C. 52. R. v. Peel, 2 F. & F. 21, where per Willes, J., 'It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant. There does appear to have been such an expectation in this case, and I shall therefore admit the declaration. R. v. Brooks, 1 Cox, C. C. 6. R. v. Taylor, 3 Cox, C. C. 84. R. v. Mooney, 5 Cox, C. C. 318. R. v. Cleary, 4 F. & F. 850.

it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances (*d*) of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence, though, in the absence of better testimony, it may serve as one of the expONENTS of the deceased's belief that his dissolution was or was not impending. It is the *impression* of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible.' (*e*)

Any hope of recovery, however slight, existing in the mind at the time of the declarations made, will render the declarations inadmissible. (*f*)

Any hope of recovery renders a declaration inadmissible.

In *Rex v. Van Butchell*, (*g*) Hullock, B., said, 'The principle on which declarations *in articulo mortis* are admitted in evidence, is, that they are made under an impression of almost immediate dissolution. A man may receive an injury from which he may think that he shall ultimately "never recover," but still that would not be sufficient to dispense with an oath. I must reject the evidence.'

On a trial for murder, it appeared that the declaration of the murdered woman was taken by the magistrate's clerk on the night of the 17th of October. She was then breathing with considerable difficulty. She had been thrown into a river the night before, but was rescued in an exhausted condition. She continued ill and in great danger, and during the day had desired that some one should pray with her. In answer to the magistrate's clerk she said she thought she was likely to die. She was sworn, and before her declaration was completed, in answer again to the magistrate's clerk, she said that she had the fear of death before her, and had no pre-

(*d*) *R. v. Bonner*, 6 C. & P. 386, John's case, *post*, 358.

(*e*) *Greenl. Ev.* 189. 1 *Phil. Ev.* 285.

In *Woodcock's case*, 1 Leach, 500, the declarations were made forty-eight hours before the death. In *Tinkler's case*, 1 East, P. C. 354, some of them were made ten days before the death. In *Rex v. Mosley*, R. & M. C. C. R. 97, they were made eleven days before the death. In *Rex v. Bonner*, 6 C. & P. 386, they were made three days before death; and were all received. In *Rex v. Van Butchell*, *infra*, they were made seven days before the death and rejected. See *R. v. Bernadotti*, 11 Cox, C. C. 316. In *Craven's case*, 1 Lew. 77, a person who had been confined to his bed 12 weeks, said to the surgeon, 'I am afraid,

doctor, I shall never get better,' and shortly afterwards died. Hullock, B., held that an account given by the deceased to the doctor after this declaration was receivable as a dying declaration, although several weeks before his death, and stated that the subject had been lately before the judges, and his mind was made up about it.

(*f*) *R. v. Welbourn*, 1 East, P. C. c. 5, s. 124, p. 358. *Rex v. Crockett*, 4 C. & P. 544. *Rex v. Christie*, Carr. Supp. 202. *R. v. Hayward*, 6 C. & P. 157. *Wilson's case*, 1 Lewin, 78. *Errington's case*, 2 Lew. 148. *Simpson's case*, 1 Lew. 78. *R. v. Spilbury*, 7 C. & P. 187. *R. v. Megson*, 9 C. & P. 418. *R. v. Fagent*,

(*g*) 3 C. & P. 629.

sent hope of recovery. The declaration was put into writing and read over to her, and she was asked to correct any mistake; it was written down: 'I have made the above statement with the fear of death before me, and with no hope of my recovery.' She then said, 'No hope at present of my recovery.' The clerk thereupon inserted the words 'at present.' She died the next morning. The declaration was admitted in evidence at the trial. Held, that, under the above circumstances, the declaration so taken was inadmissible, inasmuch as the conduct and acts of the deceased rendered it at least doubtful whether she was under an unqualified belief that death was immediately impending and absolutely devoid of hope of recovery; and the conviction was quashed. (*h*)

Where a constable proved that from appearances I should judge that the deceased was dying. He was making his statement to me about a quarter of an hour. I believe he knew he was dying. I cannot recollect that he said anything about dying before he began his statement. As he finished, he said, 'Oh God! I am going fast; I am too far gone to say any more.' The deceased died a few hours afterwards of a wound in the abdomen that penetrated the stomach. Cresswell, J., having consulted Williams, J., said, 'My brother Williams confirms the doubts I had on this subject; that it being possible the man did not discover the extent of his weakness till he had made the statement, and that it was only after he had made it he for the first time discovered that he was going fast; there is not, consequently, that clear ascertainment of his consciousness of his state, before he made it, to render it admissible. (*i*)

There need not be an apprehension of death in a certain number of days or hours.

In order to render a statement admissible as a dying declaration, it is necessary that the person who makes it should be under an apprehension of death; but there is no necessity that such apprehension should be of death in a certain number of hours or days. The question turns rather on the state of the person's mind at the time of making the declaration than upon the interval between the declaration and the death. (*k*) Where, therefore, the deceased made a declaration on the 23rd of October, concluding, 'I have made this statement believing I shall not recover,' and at that time the deceased was in a state, from the injuries that he had received, from which it was impossible that he could recover. His spine was broken, so that death must speedily follow, and he died on the 3rd of November; and the doubt as to the admissibility of the declaration was raised by a witness, who proved that, shortly before the deceased made the statement, he asked him how he was, and the deceased answered, 'I have seen the surgeon to-day, and he has given me some little hope that I am better; but I do not myself think I shall *ultimately* recover;' and that before he left the room, on the same occasion, the deceased said that *he could not recover*; but it was held on a case reserved, that the

(*h*) *R. v. Jenkins*, 38 L. J. M. C. 82, *et per Kelly*, C. B. The judge must be perfectly satisfied beyond a reasonable doubt that the declarant was under the belief that no hope of recovery existed. *R. v. Qualter*, 6 Cox, C. C. 357.

(*i*) *Reg. v. Nicolas*, 6 Cox, C. C. 120. The statement was, however, afterwards received, the counsel for the prisoner withdrawing his objection to it.

(*k*) *Per Pollock*, C. B., *Reg. v. Reaney*, *infra*.

declaration had been properly admitted. The deceased was so injured, his *status* was such that he could not possibly recover, and his own opinion was that he could not recover; and in a case like this, where there was an injury to the spine, he was probably a more competent judge of his state than the doctor, he had no hope, though the doctor had held out hopes, and before the witness left the room he said that he could not recover. That was his own opinion of his case, and the impression on his mind was that death was impending. (*l*)

It is not necessary that the deceased should *express* any apprehension of danger; for his consciousness of approaching death may be inferred, not only from his declaring that he knows his danger, but from the nature of the wound, or state of illness or other circumstances of the case. And if it may reasonably be inferred from the nature of the wound, the state of illness and other circumstances, that the deceased was sensible of his danger, his declarations are admissible. (*m*)

The deceased need not express apprehension of danger.

A surgeon found a transverse wound across the throat of the deceased, which had passed through the trachea, and the point of the instrument had reached the vertebræ. Three days afterwards she stated to the surgeon that she did not think she should recover. He considered her in danger, but had a hope she would recover. To the nurse who attended her, she had repeated several times, both before and after the surgeon had seen her, that she should die. The nurse told her she thought she would get better. She said she thought she would, if the surgeon could see in her throat as he could see on her hands. This she said many times, and all day she said she should get better if it was not for her throat. The surgeon spoke cheerfully to her, and she appeared cheerful after that, and in better spirits. She got a little better, and was easier after the surgeon dressed the wounds. A magistrate saw her, and told her of her condition, and that she was in very great danger. He repeated two or three times, in various forms, something of the same kind—that she was likely to die; that she might die; and added, ‘I hope it may please Almighty God to bring you round, but I believe you are in great danger. I think it very possible this will end fatally with you. I am come to hear you, and whatever you say, should you die, will be produced in evidence on the trial of the prisoner. You must therefore tell me the truth, and nothing but the truth, without any fear or reserve.’ She said nothing. He then said, ‘It would be a very sad and awful thing for you to go into the presence of your Maker, having told me anything, in your present situation, which is false.’ From her not having said anything to him, he told her he should administer an oath to her,

Questions as to whether a declaration was spontaneous and under an impression that no hope of recovery existed.

(*l*) Reg. v. Reaney, D. & B. 151. Wightman, J., said, ‘The statement must have been made under an impression upon the mind of the person making it that his death was about to happen shortly, or, to use the expression found in the books, that his death was impending: that, however, is a relative term, and does not, of course, import merely an expectation that the sufferer would die at some time—for that is the debt which we all owe to nature—but it means

an expectation that he is about to die shortly of the disease or injuries under which he is then suffering; that, in other words, he is without a reasonable or any hope of recovery.’ 7 Cox, C. C. 209.

(*m*) John’s case, 1 East, P. C. c. 5, s. 124, p. 357, by the decision of all the judges in 1790. Woodcock’s case, 1 Leach, 500. Dingler’s case, 2 Leach, 561. Rex v. Bonner, 6 C. & P. 386. Patteson, J. Reg. v. Perkins, 2 Moo. C. C. R. 135.

which he did, and by means of questions to her he got her to tell him, and what she said was reduced into writing, and read over to her; and he then said to her, 'Now that is perfectly true, and the whole truth?' and she said 'It is.' She then put her mark to it. It was objected that this declaration was not made spontaneously, and not under a sense of immediate and impending death; but it was held that it must be taken on the whole that the statement was spontaneous, and that, looking at her state, and at her expressions, there was not the slightest hope in her mind of recovery. (*n*)

The decision of points of this kind must always rest on the circumstances of each individual case. (*o*) It is therefore unnecessary to refer at length to the numerous cases reported on this subject.

It is a question for the judge whether the deceased was in such a state of mind as to make his statements admissible.

All the judges agreed at a conference in Easter Term, 1790, that it ought not to be left to the jury to say whether the deceased thought he was dying or not; for that must be decided by the judge before he receives the evidence. (*q*) And where on a trial for murder in Ireland a dying declaration was tendered in evidence, and the judge left it to the jury to say whether the deceased knew when he made it that he was at the point of death, the question as to the propriety of the course adopted in that case was sent over for the opinion of the English judges, who answered that the course taken was not the right one, and that the judge ought to have decided the question himself. (*r*) And such has been the uniform practice in all the recent cases.

As to what matters the judge will inquire.

The circumstances, under which the declarations were made, are to be shown to the judge, and he will hear all that the deceased has said relative to his situation, and will inquire into the state of illness in which he was; the opinions of medical and other persons as to his state, and whether they were made known to the deceased; the conduct of the deceased in settling his affairs; in making his will; giving directions as to his funeral or family; and whether he had recourse to those consolations and rites of religion, which are appropriate to the last sad hours of departing mortality; in a word, into every fact and circumstance which may tend to throw light upon the state of mind of the deceased at the time when the declaration was made, in order the better to enable him to arrive at a satisfactory determination as to whether the evidence be admissible or not. (*s*)

Only admissible when the death of deceased is the subject of the

It is a general rule that dying declarations, although made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying

(*n*) *Reg. v. Whitworth*, 1 F. & F. 382. *Watson, B.*, who refused to reserve the point, and the prisoner was executed.

(*o*) *Reg. v. Dalmas*, 1 Cox, C. C. 95, *Gurney, B.*, and *Williams, J.* It was also held that a conversation was evidence for the purpose of showing the condition of the deceased when she made the declaration.

(*q*) *John's case*, East, P. C. 115, 124, p. 357. *Welbourn's case*, *ibid.* 355,

S. P., resolved by all the judges in Mich. Term, 1792. *Rex v. Hucks*, 1 Stark. N. P. C. 523. *R. v. Smith*, 10 Cox, C. C. 82, what the declaration is, is for the jury, S. C. per *Channell, B.*

(*r*) *Major Campbell's case*, as stated by *Parke, B.*, in 11 M. & W. 486.

(*s*) See *Rex v. Van Butchell*, *ante*, p. 355, per *Bolland, B.* *Rex v. Spillsbury*, 7 C. & P. 187, per *Coleridge, J.*



declaration. (t) In the case of *Rex v. Hutchinson*, (u) tried before Bayley, J., the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry. And so where the prisoner was indicted for using instruments to procure the miscarriage of a woman, her dying declaration was held inadmissible. (v)

charge, and the circumstances of the death the subject of the declaration.

But where two persons died from the same act of poisoning, the declaration of one was held admissible on the trial of the prisoner for the murder of the other. On an indictment for poisoning King, it appeared that the poison was administered in a cake, which the deceased ate for breakfast; immediately after which he was taken ill, and his maid servant, who was present, and had made the cake, said that she was not afraid of it, and thereupon ate of it, and was in consequence poisoned and died. Her dying declarations (made after she knew of her master's death, and was conscious of her own approaching death) as to the manner in which she had made the cake, and that she had put nothing bad in it, and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other end of it, were tendered in evidence, and objected to, on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of inquiry at the trial; and the preceding case was relied upon. But Coltman, J., after consulting Parke, B., expressed himself of opinion that, as it was all one transaction, the declarations were admissible, and accordingly allowed them to go to the jury; but he said he would reserve the point for the opinion of the judges. (w)

Declaration of one of two persons dying from the same act.

The declarations of the deceased are admissible only as to those things to which he would have been competent to testify, if sworn in the case. They must, therefore, in general speak to facts only, and not to mere matters of opinion, and must be confined to what is relevant to the issue. (x)

Declarations only evidence of facts.

The dying declaration of an accomplice is admissible; (y) but this can only happen where the prisoner is charged with assisting in the self-destruction of the accomplice: for it has already appeared that dying declarations are never admissible, except where the death of the person who made them is the subject of the indictment.

Of an accomplice.

(t) By Abbot, C. J., *Rex v. Mead*, 2 B. & C. 605. In trials for robbery the dying declarations of the party robbed were held inadmissible by Bayley, J., on the Northern Spring Circuit, 1822, and by Best, J., on the Midland Spring Circuit, 1822. And in *Rex v. Lloyd*, 4 C. & P. 233, by Bolland, B., and in rape. *Reg. v. Newton*, 1 F. & F. 641, by Hill, J. Drummond's case, 1 Leach, 337, where it was ruled that the dying declaration of a convict at the moment of execution was not evidence. See the observations of the Court of Exchequer in

*Stobart v. Dryden*, 1 M. & W. 615, which render it at least very doubtful whether dying declarations would at the present day be admissible in any civil suit. 1 Phil. Ev. 280.

(u) 2 B. & C. 608, in note to *Rex v. Mead*.

(v) *Reg. v. Hind*, Bell, C. C. 253.

(w) *Rex v. Baker*, 2 M. & Rob. 53. The prisoner was acquitted.

(x) *Greenl. Ev.* 190. 1 Phil. Ev. 291. *Rex v. Sellers*, Carr. Supp. 233.

(y) *Wickes's case*, 1 East, P. C. 354.

A parol dying declaration is admissible, though a subsequent one was made and reduced to writing.

It is no objection to the admission of a dying declaration, that the deceased made a subsequent statement to a magistrate, which was taken down in writing, and is not produced. Where three several declarations had been made by the deceased in the course of the same day at the successive intervals of an hour each; the second had been made before a magistrate, and reduced into writing, but the others had not; the original written statement, taken before a magistrate, was not produced, and a copy of it was rejected. A question then arose, whether the first and third declarations could be received; and Pratt, C. J., was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof: but the other judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third; and evidence of those declarations was accordingly admitted. (z)

When in writing.

But if the statement of the deceased was committed to writing, and *signed by him* at the time it was made, it has been held essential that the writing should be produced if existing, and that neither a copy nor parol evidence of the declaration could be admitted to supply the omission. (a) But the decisions on this point are altogether unsatisfactory; for there is no authority, by Act of Parliament or otherwise, for taking a dying declaration in writing, and the words uttered by the deceased are just as much primary evidence as any writing in which they may be incorporated. (b)

When taken on oath.

If the statement of the deceased has been taken on oath before a magistrate, but is inadmissible as a deposition, in consequence of the prisoner not having been present when it was taken, or for any other reason, (c) it is admissible as a declaration *in articulo mortis*, if taken under such circumstances as would render such a declaration receivable in evidence. (d) And evidence is admissible to prove that the deposition was taken at a time when the deceased was aware of the near approach of death, although the deposition contains no statement to show that the deceased made it in contemplation of death. (e)

As to the mode of eliciting the statements.

It is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the case; though any departure from the mode may affect the value and credibility of the declarations. Therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation. (f)

(z) *Rex v. Reason*, 1 Str. 499. 6 St. Tr. 502. 2 Stark. Evid. 366. According to the report in the State Trials, the chief justice and Mr. J. Powys deemed the evidence inadmissible. At all events, it appears the evidence was received. Sir J. Strange was one of the counsel in the cause.

(a) *Rex v. Gay*, 7 C. & F. 230, Greenl. Ev. 199. Trowter's case, 12 Vin. Abr. 118, 119. *Leach v. Simpson*, in Scac. "asch. 1839, 1 Law & Eq. Rep. 58.

(b) *Rex v. Reason*, *supra*, seems at variance with these cases, and see Robinson v. Vaughton, 8 C. & F. 222, and *Microscop.*

cases, *ante*, p. 329, and *post*, as to the grounds on which depositions are admissible. See *Rex v. Bell*, 5 C. & P. 162, *post*, and the judgment in *Reg. v. Christopher*, 1 Den. C. C. 536.

(c) *Reg. v. Clarke*, 2 F. & F. 2.

(d) *Rex v. Dingler*, 2 Leach, 561. *Rex v. Callaghan*, M'Nally Ev. 385, Rosc. Cr. Ev. 33.

(e) *Reg. v. Hunt*, 2 Cox, C. C. 239. Pollock, C. B., after consulting Coleridge, J.

(f) Greenl. Ev. 190, citing *Rex v. Fagant, infra*. *Commonwealth v. Vass*, 10 Mass. 202. *Reg. v. Reason*, 1 Str.

Where a surgeon, in a case of murder, was called to prove a dying declaration, and stated that he put questions to the deceased for the purpose of ascertaining whether it would be necessary for a magistrate to come to her house to take her examination, and it was objected that the statement being in answer to questions, and not a connected continuous statement flowing from herself, could not be received; it was held that the declaration was admissible. (*g*)

But whatever the statement may be, it must be complete in itself; for if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received. (*h*)

The dying declarations of the deceased are not only admissible against a prisoner, but also in his favour. (*i*)

As the declarations of a dying man are admitted, on a supposition that in his awful situation on the confines of a future world he had no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows, that the party against whom they are produced in evidence may enter into the particulars of his state of mind and of his behaviour in his last moments, or may be allowed to show that the deceased was not of such a character as was likely to be impressed by a religious sense of his approaching dissolution. (*j*)

If a child be too young to be capable of having an idea of a future state, his declarations are inadmissible. (*k*)

But if a child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences, in a future state, of telling a falsehood, his declarations, made under the apprehension and expectation of immediate death, are admissible in evidence. (*l*)

In favour of the prisoner.

Prisoner in his defence may show the state of mind or character of the deceased.

Declarations by a child.

Of the effect

499. *Rex v. Woodcock*, 2 Leach, 561, and see *Rex v. Welbourn*, *ante*, p. 358. *R. v. Smith*, L. & C. 607; *R. v. Steele*, 12 Cox, C. C. 168.

(*g*) *Rex v. Fagent*, 7 C. & P. 238, Gaselee, J.

(*h*) *Greenl. Ev.* 190, citing *Commonwealth v. Vass*, 3 Leigh, R. 797.

(*i*) *Rex v. Scaife*, 1 M. & Rob. 551. See *Drummond's case*, *ante*, p. 359. The ground upon which dying declarations are admissible being that they are tantamount to statements made upon oath in the presence of the prisoner, and such statements being clearly admissible if in favour of the prisoner, there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner. Indeed almost every case of manslaughter, in which such declarations have been admitted, is an authority to that effect, as the *prima facie* presumption is, that the prisoner had murdered the deceased. And, moreover, a declaration in favour of a prisoner must ever be taken to be more likely to be true, as it is not probable that a person should make

a statement favourable to the person who has inflicted a mortal injury upon him, but rather the contrary. C. S. G.

(*j*) 1 Phil. Ev. 289. In *Reg. v. McCarthy*, Gloucester Sum. Ass. 1842, the case on the part of the prosecution was that the prisoner had assaulted the deceased, and that the deceased followed the prisoner along several streets for the purpose of giving him into the custody of the police; and Erskine, J., permitted the counsel for the prisoner to cross-examine the witnesses for the prosecution as to the bad character of the deceased, in order to show that the prisoner might have had a reasonable ground for supposing that the deceased followed him for the purpose of robbing him. C. S. G.

(*k*) *Rex v. Pike*, 3 C. & P. 598. Park, J. A. J., after consulting Parke, J. The child in the case was four years old, and it was held that his declaration was inadmissible.

(*l*) *Reg. v. Perkins*, 2 Moo. C. C. R. 135. 9 C. & P. 395, S. C. In this case the child was more than ten years old.

of dying declarations.

served that, though such declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to great weight (*m*) if clearly and distinctly proved, yet it is always to be recollected that the accused has not had the opportunity of cross-examination—a power quite as essential to the eliciting of *the whole* truth, as the obligation of an oath can be, and without which no statement made on oath, however solemnly administered, is admissible under any other circumstances; and that where the deceased had not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is, in such cases, withdrawn. And it is further to be considered that the particulars to which the deceased has spoken were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of the persons and to the omission of facts essentially important to the completeness and truth of the narrative. (*n*) When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, yet they are nevertheless open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination. (*o*) It may be added also that the deceased in many cases is labouring under injuries which may affect the brain, and prevent the possibility of reason guiding the words that may be uttered, and yet the means of ascertaining the state of his mind may be such as to render it in the highest degree difficult to discover whether a statement has been made under a morbid delusion of the mind, or in the tranquil exercise of calm reason, operated upon alone by the awful consciousness that he must almost immediately render an account to an all-knowing Creator.

Hearsay in proof of public rights, boundaries of parishes, &c.

Hearsay evidence is also admissible for the purpose of proving public rights, and rights in the nature of public rights. (*p*) Thus in questions concerning the boundary of parishes or manors, traditional reputation is evidence: (*q*) and the declarations of old

(*m*) See per Coleridge, J., *Rex v. Spilsbury*, 7 C. & P. 187.

(*n*) *Greenl. Ev.* 192. 1 Phil. Ev. 292.

(*o*) *Ashton's case*, 2 Lew. 147, per Alderson, B. A striking instance of the danger of trusting to statements made after a mortal wound has been inflicted occurred in *Reg. v. Macarthy*, Gloucester Sum. Ass. 1842. The prisoner was indicted for murder, and the deceased had been stabbed by the prisoner whilst he was pursuing him in order to give him into

custody for an assault, and the deceased expressly stated that the prisoner had knocked him down, but two companions of the deceased, who were present during the whole time, distinctly proved that the deceased was not knocked down at all. C. S. G.

(*p*) 1 Phil. Ev. 238, 241. 1 Stark. Ev. 49. *Rosc. Ev.* 28.

(*q*) *Nicholls v. Parker*, 14 East, 331, in note to *Outram v. Morewood*. And it seems that a map made from the repre-

persons deceased have been admitted in such cases, although they were parishioners and claimed rights of common on the wastes, which their evidence had a tendency to enlarge. (*r*) But although general reputation is evidence on a question of boundary or custom, yet the tradition of a particular fact (as that turf was dug or a post put down in a particular spot) is not admissible. (*s*)

Declarations or statements made by deceased persons, where they appear to be against their own interests, have in many cases been admitted: as entries in their books charging themselves with the receipt of money on account of a third person, (*t*) or acknowledging the payment of money due to themselves. (*u*) Thus a written memorandum by a deceased man-midwife, stating that he had delivered a woman of a child on a certain day, and referring to his ledger in which a charge for his attendance was marked as paid, was thought by the Court of King's Bench to have been properly received in evidence, upon an issue as to the child's age. (*v*) So where the point in issue was whether a certain waste was the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons in satisfaction of trespasses committed on the waste were admitted in evidence, to show that the right to the soil was in his master, under whom the plaintiff claimed. (*w*) So receipts for rent found in the possession of a tenant are evidence that the person who signed them was seised in fee. (*x*) On the same principle, entries in the books of a tradesman by his deceased shopman, who thereby supplies proof of a charge against himself, have been admitted in evidence, as proof of the delivery of the goods, or of other matter there stated within his own knowledge. (*y*) But where the effect of the entry is not to charge the servant, it is not evidence. Thus, in an action for the hire of horses, an entry by the plaintiff's servant, since dead, stating the terms of the agreement with the defendant, is not evidence. (*z*) Such declarations are admissible only on the ground that they are against the proprietary or pecuniary interest of the party making them, and a declaration is not receivable in evidence, because it would subject the party to a prosecution if he were living. Thus, if A. were indicted for murder, and B., who was dead, had made a declaration that he was present when the murder was committed, though that declaration was against his interest, and would have subjected him to a prosecution if living,

Hearsay of deceased persons making statements against their own interest.

Entries in a tradesman's books by deceased shopman.

sentations of a deceased person, who pointed out the boundaries, would be evidence of such boundaries. *Reg. v. Milton*, 1 C. & K. 58. *Erskine, J.*

(*r*) *Nicholls v. Parker*. But such declarations must not have been made *post litem motam*, that is, after the very same point or question has become the subject of controversy. *Rex v. Cotton*, 3 Campb. 444. 1 Phil. Ev. 260.

(*s*) *Weeks v. Sparke*, 1 M. & S. 680. *Ireland v. Powell*, Peake's Ev. 15, *cor.* *Chambre, J.* *Chatfield v. Frier*, 1 Price, 256. 1 Phil. Ev. 245.

(*t*) 1 Phil. Ev. 293. *Middleton v. Melton*, 10 B. & C. 317.

(*u*) *Ibid.*

(*v*) *Higham v. Ridgway*, 10 East, 109.

Entries in the land-tax collector's books, stating A. B. to be rated for a particular house, and his payment of the sum rated, were held by *Abbott, C. J.*, admissible evidence to show that A. B. was in the occupation of the premises at the time mentioned. *Doe v. Cartwright, Ry. & Mood*. N. P. C. 62.

(*w*) *Barry v. Bebbington*, 4 T. R. 514. (*x*) *Doe dem. Blayney v. Savage*, 1 C. & K. 487.

(*y*) 1 Phil. Ev. 319. *Price v. Lord Torrington*, 1 Salk, 285.

(*z*) *Calvert v. Archbishop of Canterbury*, 2 Esp. 646. *Rosc. Ev.* 34. *Webster v. Webster*, 1 F. & F. 401. *Smith v. Miles*, 10 Q. B. 326.

Entries in the course of business.

yet it would not be admissible after his death. (*a*) Where an entry or declaration is made by a disinterested person in the course of discharging a professional or official duty, it is, in general, admissible after the death of the party making it. Thus, a notice indorsed as served by a deceased clerk in an attorney's office, whose duty it was to serve notices, is evidence of service. (*b*) An entry of dishonour of a bill, made by a notary's clerk in the usual course of business, is evidence of the fact of dishonour, after the clerk's decease. (*c*) And if a declaration be made in the discharge of a duty by a deceased person, it is admissible, whether oral or written. (*d*) In all these cases, the person who made the entry must be proved to be dead. (*e*) Where it appeared that the entry was in the handwriting of a banker's clerk, who was then in the East Indies, it was held inadmissible. (*f*)

Death of person who made the entry must be proved.

Distinction between declarations against interest and those made in discharge of a duty.

There is a distinction between declarations against interest and declarations made in the discharge of a duty. The former declarations are evidence of all the facts stated; the latter only of the facts which it was the business of the writer to state. (*g*) So entries against interest are evidence whensoever made. The latter entries, in order to be evidence, must generally be cotemporaneous with the act done. (*h*)

Other cases of hearsay.

There are other exceptions to the general rule against the reception of hearsay evidence, such as the admission of declarations in cases of pedigree, and of old leases, rent-rolls, surveys, &c., which can occur so seldom in criminal proceedings, that it is not thought necessary to take further notice of them in this treatise. (*i*)

(*a*) The Sussex Peerage case, 11 Cl. & F. 85, per Lord Lyndhurst, C. In that case a declaration by a clergyman that he had solemnized a marriage, was held not to be admissible, on the ground that it might have subjected the clergyman to a prosecution for solemnizing the marriage. *Standen v. Standen*, Peake N. P. C. 45, was strongly questioned in this case.

(*b*) *Doe v. Turford*, 3 B. & Ad. 890. *Doe v. Skinner*, 3 Ex. 84. *R. v. Dukinfield*, 11 Q. B. 678. *Price v. Lord Torrington*, 1 Salk, 285.

(*c*) *Poole v. Dicas*, 1 New Cases, 649.

(*d*) Per Lord Campbell, C. J. *Stapylton v. Clough*, 2 E. & B. 933; 23 L. J. Q. B. 5. The Sussex Peerage case, 11 Cl. & F. 113. By the Jewish law the

custom is that children are circumcised on the eighth day from their birth, and it is the duty of the Chief Rabbi to perform this rite, and make an entry of it in a book; but it has been held that an entry made by a Chief Rabbi of a circumcision is not evidence after his death. *Davis v. Lloyd*, 1 C. & K. 275, Lord Denman, C. J., & Patteson, J.

(*e*) *Cooper v. Marsden*, 1 Esp. 2, by Lord Kenyon, C. J.

(*f*) *Ibid.* *Stephen v. Gwenap*, 1 M. & Rob. 121.

(*g*) See *Percival v. Nanson*, 7 Ex. 1; 21 L. J. Ex. 1.

(*h*) See *Smith v. Blakey*, L. R. 2 Q. B. 326.

(*i*) See *post*, as to evidence of character.

## CHAPTER THE SECOND.

THE PROOF OF NEGATIVE AVERMENTS, p. 365.—THE RULE THAT THE EVIDENCE MUST BE CONFINED TO THE POINT IN ISSUE, p. 368.—WHAT ALLEGATIONS MUST BE PROVED, AND WHAT MAY BE REJECTED, p. 391;—AND THEREWITH OF SURPLUSAGE AND OF VARIANCE.

## SEC. I.

*Of the Proof of Negative Averments.*

IT is a general rule of the law of evidence, in criminal as well as in civil proceedings, that it lies on him who asserts the affirmative of a fact to prove it, and not on him who asserts the negative, unless under peculiar circumstances where the rule does not apply. (a) Thus, on an indictment for bigamy, where the first marriage was by license, and the prisoner appeared to be under age at the time, it was held that it lay on the prosecutor to prove the consent of parents, required by the 26 Geo. 2, c. 33, in order to show the marriage valid, and not on the prisoner to prove the negative in his defence. (b)

General rule that he who asserts the affirmative must prove it.

In criminal proceedings, however, where negative averments usually impute a breach of the law to the defendant, the operation of this rule is sometimes counteracted by the presumption of law in favour of innocence; which presumption, making, as it were, a *prima facie* case in the affirmative for the defendant, drives the prosecutor to prove the negative. (c) Thus, on an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proving the negative that he did not deliver them; for a person shall be presumed duly to have executed his office till the contrary appear. (d) On an indictment for obtaining money, &c. under false pretences the prosecutor must prove the averments negating the pretences. In an action for the recovery of penalties under the Hawkers' and Pedlars' Act against a person charged with having sold goods by auction in a place in which he was not a householder, some proof of this negative, namely, of the defendant not being a householder in the place, would be

The presumption of law in favour of innocence sometimes drives the prosecutor to prove the negative averments.

(a) Gilb. Ev. 131. Bull. N. P. 298.

(b) Rex v. Butler, R. & R. 61. Rex v. Morton, ib. 19, in note to Rex v. James, *ante*. But since the 4 Geo. 4, c. 76, a marriage by a minor without consent is valid. Rex v. Birmingham, *ante*, p. 299.

(c) The same rule applies in civil proceedings. The principal cases on the sub-

ject are Monke v. Butler, 1 Roll. Rep. 83, 3 East, 199. Rex v. Hawkins, 10 East, 211. Powell v. Milbank, 2 W. Bl. 851. S. C. 3 Wils. 355. Williams v. East India Company, 3 East, 193. Rex v. Twynning, 2 B. & A. 386. Doe v. Whitehead, 8 A. & E. 571.

(d) Bull. N. P. 298.

necessary on the part of the plaintiff. (e) On the trial of an indictment on the 42 Geo. 3, c. 107, s. 1, which made it felony to course deer on an inclosed ground, 'without the consent of the owner of the deer,' it ought to have appeared from the evidence produced on the part of the prosecution that the owner had not given his consent. (f)

But this presumption does not operate when the affirmative is peculiarly within the knowledge of the party charged.

But where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate in the manner just mentioned; but the general rule, as above stated, applies, viz. that he who asserts the affirmative is to prove it, and not he who avers the negative.

Thus upon a conviction under the 5 Ann. c. 14, s. 2, against a carrier for having game in his possession, it was held sufficient that the qualifications mentioned in the 22 & 23 Car. 2, c. 25, were negatived in the information and adjudication, without negating them in the evidence. (g) 'The question is,' said Lord Ellenborough, in that case, 'upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer who denies any qualification, to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute, to which the proof may be applied; and according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information.' (h)

In *Rex v. Hanson*, (i) the rule was again considered and laid down by the Court of King's Bench. In that case there had been a conviction by two justices for selling ale without an excise license. The information negatived the defendant's having a license; but there was no evidence to support this negative averment; the only evidence to support the conviction being that the defendant had in fact sold ale. The question was, whether the informer was bound to give evidence to negative the existence of a license. In support of the conviction it was contended, that such evidence was unnecessary, and that it lay upon the defendant to prove that he had a license; for it is a rule, both of the civil and the common law, that a man is not bound to prove a negative allegation; *Rex v. Turner* was cited as an express authority on the point. Abbott, C. J., 'I am of opinion that the

(e) 1 Phil. Ev. 494.

(f) *Rex v. Rogers*, 2 Campb. 654. See also *Rex v. Hazy*, 2 C. & P. 458, and *Rex v. Argent*, R. & M. C. C. R. 154, ante, p. 332; the former of which cases was an indictment for lopping and topping an ash tree without the consent of the owner, and the latter an indictment for taking fish out of a pond without the consent of the owner. According to the report of the case of *Rex v. Rogers*, Lawrence, J., seems to have thought it necessary to call the owner of the deer for the purpose of disproving his consent, and the owner not being called, the jury were directed to find a verdict of acquittal.

But this decision has been overruled; and it is now established that the non-consent may be inferred from the circumstances under which the act was done, or proved by the agents of the owner. *Ante*, p. 332.

(g) *Rex v. Turner*, 5 M. & S. 206. See also *Spieries v. Parker*, 1 T. R. 140, and *Jells v. Ballard*, 1 B. & P. 468, by Heath, J. In *Rex v. Stone*, 1 East, 639, the Court of King's Bench were equally divided on the point.

(h) 5 M. & S. 209.

(i) *MS. Paley on Convictions by Dowling*, p. 45, n. (1).



conviction is right. It seems to me that this case is not distinguishable from *Rex v. Turner*. It is a general rule that the proof of the affirmative lies upon the party who is to sustain it. The prosecutor, in general, is not called upon to prove negatively all that is stated in the information as matter of disqualification. In *Rex v. Turner* all the learned judges concur in that principle. I concur in all the observations upon which the judgment of the Court in that case was founded: and I think every one of them is applicable in principle to this. The general principle, and the justice of the case, are here against the defendant. It is urged, that if we decide against the defendant, we shall open the door to a great deal of inconvenience: that by no means follows; this man might have produced his license without any possible inconvenience, which would at once have relieved him from all liability to penalties. Probably the whole inquiry before the magistrates was as to the fact of selling the ale, and that nothing was said about the license; but, however, I think, by the general rule, the informer was not bound to sustain in evidence the negative averment that the defendant had not a license. I do not mean to say that there may not be cases which may be fit to be considered as exceptions to that general rule; there is no general rule to which there may not be exceptions; all I mean to say is, that this is not one of those exceptions. The party thus called upon to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license; whereas, if the case is taken the other way, the informer is put to considerable inconvenience. Discussions may arise before the magistrates, whether the evidence produced is proper to sustain the negative; whether a book should be produced, or an examined copy, and many other questions of that sort; whereas none can arise when the defendant himself produces his license. This, therefore, not being one of the excepted cases, but a case falling directly within the general rule, I am of opinion that judgment must be given for the Crown.' (j)

In *Willis's case* it is said to have been agreed that, although an indictment states that the prisoner 'then or at any time before, not being a contractor with or authorized by the principal officers or commissioners of our said Lord the King of the navy, ordnance, &c., for the use of our said Lord the King, to make any stores of war, &c.,' yet that it is not incumbent on the prosecutors to prove this negative averment, but that the defendant must show, if the truth be so, that he is within the exception in the statute. (k)

Upon the same principle, the *Apothecaries' Company v. Bentley* (l) was decided. That was an action for a penalty on the 55 Geo. 3, c. 194, for practising as an apothecary without having obtained the certificate required by that Act. All the counts in the declaration contained the allegation that the defendant did act and practise as an apothecary, &c., *without having obtained such certificate as by the said Act is directed*. No evidence was offered

*Apothecaries'  
Company v.  
Bentley.*

(j) So in *Rex v. Smith*, 3 Burr. 1475, which was a conviction for trading as a hawker and pedlar without a license, it was held that the onus of proving the license lay on the defendant.

(k) 1 Hawk. P. C. c. 89, s. 17. Vol. 2, p. 507.

(l) Ry. & Mood. N. P. C. 159. S. C. 1 C. & F. 538.

by the plaintiffs to show that the defendant had not obtained his certificate. The plaintiffs having closed their case, the counsel for the defendant submitted that there must be a nonsuit. But Abbott, C. J., said, 'I am of opinion that the affirmative must be proved by the defendant. I think that it being a negative, the plaintiffs are not bound to prove it, but that it rests with the defendant to establish his having a certificate. (m)

## SEC. II.

### *Evidence confined to the point in Issue.*

Evidence to be confined to point in issue.

Evidence must apply to the single transaction charged.

Acts of prisoner charged in indictment alone can be proved.

No evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule, that the evidence is to be confined to the point in issue; for where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule, that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. Therefore, it is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. Thus, in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time, and with another person, and that he has a tendency to such practices, ought not to be received in evidence. (n) Where upon an indictment for a burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed, it was proposed to abandon the charge of burglary, and to give evidence of a larceny by the prisoners of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the Court refused to receive the evidence, on the ground that it was a distinct transaction. (o) The prisoners were, therefore, acquitted on this charge, but were afterwards indicted again for the other offence, and convicted. In treason, no overt act, amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly

(m) See *R. v. Harris*, 10 Cox C. C. 541.

(n) *Rex v. Cole*, Mich. T. 1810, by all the judges, MS. 1 Phill. Ev. 477. In an action against the acceptor of a bill of exchange, where the defence was, that the acceptance was forged, evidence that

the party who negotiated the bill had been guilty of other forgeries was held inadmissible. *Viney v. Barss*, 1 Esp. 292. See also *Balcetti v. Serani*, Peake, N. P. C. 142. *Graft v. Bertie*, Peake's Ev. 104.

(o) *Rex v. Vandercomb*, 2 Leach, 708. Vol. 2, p. 49.

laid in the indictment; (*p*) but still, if it conduce to the proof of any of the overt acts which are laid, it may be admitted as evidence of such overt acts. (*q*) With this view the declarations of the prisoner and seditious language used by him are clearly admissible in evidence, as explaining his conduct and showing the nature and object of the conspiracy. (*r*)

So, though it is not allowable in general to inquire into any other stealing of goods, besides that specified in the indictment, yet, for the purpose of ascertaining the identity of the person, it is often important to show that other goods, which had been upon an adjoining part of the premises, were stolen in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the prosecutor's house on the night of the robbery; and in that point of view it is material. (*s*) Thus also, on an indictment for the crime of arson, it may be shown that property, which had been taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner. (*t*)

Where several are proved to have been engaged in the same design, the acts and declarations of one in furtherance of that design may be received in evidence against another, though not present; (*u*) and it seems to make no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his acts or declarations evidence against another any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted. (*v*) Neither does it appear to be material what the nature of the indictment is, provided the offence involve a conspiracy. Thus, upon an indictment for murder, if it appeared that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention would be evidence against the rest. (*w*) So where in a case of forgery several persons had been shown to be connected together in respect of the charge contained in the indictment, it was held that what was said by one of them to a witness, when they were met together, on the subject of the present forgery, was evidence against the others, although the person who said it was not upon his trial. (*x*)

Where several different felonies are alleged in the same indictment, or the evidence appears to refer to more than one distinct unconnected felony, it is usual for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine the evidence to that particular charge. (*y*) Thus, on an

Where larceny of goods not laid in indictment may be proved.

Acts of other persons engaged in the same design may be proved, whether they are indicted or not.

Prosecutor confined to proof of one felony.

(*p*) *Fost.* 245.

(*q*) *Ibid.*

(*r*) 1 *Phill. Ev.* 471, citing *Rex v. Watson*, 2 *Stark. R.* 134.

(*s*) 1 *Phill. Ev.* 169, 7th ed. See per *Littledale, J.*, in *Rex v. Rooney*, 7 *C. & P.* 517, *post*, p. 372, note (*m*).

(*t*) *Rickman's case*, 2 *East, P. C. c.* 21, s. 11, p. 1035.

(*u*) *Rex v. Stone*, 6 *T. R.* 527. See

also for examples of this rule, *Rex v. Standley, R. & R.* 305. *Rex v. Gogerley*,

*ibid.* 343. *Rex v. Bingley, ibid.* 446.

(*v*) 2 *Stark. Ev.* 329. *Ante*, p. 149.

(*w*) *Ibid.*

(*x*) *Rex v. Stansfield*, 1 *Lew.* 118, *Littledale, J.* See *Rex v. Tattersall*, *post*, p. 378, note (*n*).

(*y*) *Young v. The King*, 3 *T. R.* 106, by *Buller, J.* *Rex v. Jones*, 3 *Campb.* 132,

indictment against a receiver for receiving several articles, if it appear that they were received at different times, the prosecutor may be put to his election, (z) though on an indictment for stealing several articles it is no ground for confining the prosecutor's proof to some one of the articles, that they might have been, and probably were, stolen at different times, if they might have been stolen all at once. (a)

Proving one felony by showing prisoner guilty of another felony.

Where the felonies are connected.

Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other. (b) On an indictment for stealing six shillings, it was proved that the prisoner was a shopman in the employ of the prosecutrix, and, his honesty being suspected, on a particular day the son of the prosecutrix put seven shillings, one half-crown, and one sixpence, marked in a particular manner, into a till in the shop, in which there was no other silver at that time, and the prisoner was watched by the prosecutrix's son, who from time to time went in and out of the shop, occasionally looking into and examining the till, while customers came into the shop and purchased goods. Upon the first examination of the till it contained 11s. 6d.; after that, the son of the prosecutrix received one shilling from a customer and put it into the till; afterwards another person paid one shilling to the prisoner, who was observed to go with it to the till, to put his hand in, and withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The till was examined by the witness, and 11s. 6d. were found in it instead of 13s. 6d. which ought to have been there. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when Wilde, Serjt., objected that evidence of one felony had already been given, and that the prosecutrix ought not to be allowed to prove several felonies. The learned judge overruled the objection, and the son of the prosecutrix proved that, upon each of several inspections of the till after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been found guilty, application was made to the Court of King's Bench for a rule for staying the judgment, on the ground that the prosecutor ought to have been confined in proof to one felony; but the Court was of opinion that it was in the discretion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts, which were all part of one entire transaction. (c)

So where on an indictment for stealing pork, a bowl, some knives, and a loaf of bread, it appeared that the prisoner entered a shop and ran away with the pork, and returned in about two minutes, replaced the pork in a bowl, which contained the knives,

Rex v. Kingston, 8 East, 41. But this rule does not extend to misdemeanors. Rex v. Finacane, 5 C. & P. 551.

(z) Rex v. Dunn, R. & M. C. C. R., 146. When he will not be so, see vol. 2, p. 280.

(a) Ibid. When the prosecutor will not be required to elect when goods have

been taken at different times, see vol 2, p. 268, 280.

(b) Per Bayley, J. Rex v. Ellis, 6 B. & C. 145.

(c) Rex v. Ellis, *supra*. The indictment had been removed into that Court by *certiorari* from the city Court of Exeter.

and took away the whole together ; in about half-an-hour after, he came back to the shop, and took away the loaf of bread. Little-dale, J., said, 'This taking away the loaf cannot be given in evidence upon this indictment. I think that the prisoner's taking the pork and returning in two minutes, and then running off with the bowl, must be taken to be one continuing transaction ; but I think that half-an-hour is too long a period to admit of that construction. The taking of the loaf therefore is a distinct offence.' (d) So where the prisoner was indicted for stealing a halfpenny, and the prosecutor had marked a quantity of pence and halfpence and locked them up in a bureau, and had missed one halfpenny on the 9th of July, and others on the 13th ; Erle, J., held that the prosecutor might prove that after the 13th the prisoner was searched, and all the marked pence found upon her, and that he could not say which of them was stolen on the 9th, but it must be one of them ; for it mattered not that the evidence might apply to another charge if it were revelant and necessary for the support of this charge. (e)

The prisoner was indicted for stealing one shilling. The prisoner was taken into custody, and the shilling, which had been marked, found in his possession, and the constable asked him if he had any more of the prosecutor's money about him, on which he produced some half-crowns, and said something about them ; and it was held that the statement so made was not admissible, as it related to another felony. (f)

An admission  
of another  
distinct felony

In the case of *Rex v. Wylie*, (g) Lord Ellenborough said he remembered a case where a man committed three burglaries in one night ; he took a shirt at one place and left it at another ; and they were all so connected, that the Court went through the history of the three different burglaries. So where three burglaries were committed in the town of Uttoxeter, one at Keeling's and another at Bladon's, between twelve and three o'clock of the same night, and at Bladon's a crowbar was found, which fitted some marks on a chest broken open at Keeling's, and which was proved to have been in the possession of the prisoners previously to the night in question ; Wightman, J., on the authority of the preceding case, allowed evidence to be given of the finding of the crowbar at Bladon's, and also of the finding goods stolen the same night from Bladon's in the possession of the prisoners, as such evidence tended to show that the prisoners had been at Bladon's, and that they might have left the crowbar there. (h) So where on an indictment for breaking into a counting house of the Midland Railway Station at Nether Whitacre, it was proposed to prove that the prisoners on the same night had successively broken into the stations of Wilnecote, Kingsbury, Nether Whitacre, and Forgehills, Nether Whitacre being at some distance from the other stations, and that some of the property taken from Nether Whitacre had been found on two of the prisoners, and property taken from another station

Several bur-  
glaries in the  
same night.

(d) *Rex v. Birdseye*, 4 C. & P. 386.

(e) *Rex v. May*, 1 Cox, C. C. 236. Erle, J., told the jury to convict, if they were satisfied that all the halfpence were identified, but to acquit if any was not identified.

(f) *Reg. v. Butler*, 2 C. & K. 221, Platt, B.

(g) 1 New Rep. 94, S. C. 2 Leach, 983.

(h) *Reg. v. Stonyer and others*, Stafford Sum. Ass. 1843. MSS. C. S. G.

on the third, and that jemmies had been found on each prisoner, which corresponded with marks on doors and drawers broken open at one or other of the stations; Bramwell, B., said, 'I think that evidence of the acts of the prisoners during the same night is admissible in order to explain why none of the property taken from Nether Whitacre was found upon one of the prisoners. If it is proved that he was found in possession of other property stolen from another station on the same night, that, with other circumstances, might be evidence that all the men had been engaged in each burglary, and that the third man had received his share of the booty wholly from what was taken from the other stations. The events of that night, relating to these burglaries, are so intermixed that it is impossible to separate them.' (i)

Where several felonies are all parts of the same transaction, evidence of all is admissible, upon the trial of an indictment for any of them.

Where several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them. Thus upon an indictment against two prisoners, charging each in different counts as principals in the first degree in committing a rape, and also as principals in the second degree in other counts, evidence has been held admissible that the prisoners, together with three other men, committed at the same place and time, the one after the other successively, rapes upon the body of the prosecutrix, the others aiding and abetting in turn. (j) So where there were three indictments against the prisoner for setting fire to three ricks belonging to three different persons, and it appeared that the ricks, which were in sight of each other, were set on fire one immediately after the other, but the strongest evidence being as to the last, that indictment was tried first; the confession of the prisoner relating to all the three ricks, and the evidence of an accomplice as to all, was admitted, as the whole constituted part of the same transaction. (k) And where an indictment for arson contained five counts for setting fire to five different houses, which were all in one row, and the fire from the one first on fire had communicated to the others, it was held that, as it was all one transaction, the evidence as to all the houses was admissible. (l) So where upon an indictment against the prisoners for robbing Woodward, there being another indictment against them for robbing Urwick of a watch, it appeared that Woodward and Urwick were travelling in a gig, when they were stopped and robbed; Littledale, J., held that evidence might be given that Urwick lost his watch at the same time and place that Woodward was robbed, but that evidence was not admissible of the violence that was offered to Urwick. One question in the case was, whether the prisoners were at the place in question when Woodward was robbed; and as proof that they were so, evidence was admissible that one of them had got something which was lost there at that time. (m) And where upon an indictment for robbing

(i) Reg. v. Cobden, 3 F. & F. 833.

(j) Rex v. Folkes, R. & M. C. C. R. 354. And the same was held in Rex v. Lea, 2 Moo. C. C. R. 9. 7 C. & P. 836. There several rapes committed in one boat were given in evidence; but other rapes committed in another boat, to which the prosecutrix was carried from the first boat, were not offered in evidence, as they

were the subject of another indictment. C. S. G.

(k) Rex v. Long, 6 C. & P. 179, Gurney, B.

(l) Reg. v. Trueman, 8 C. & P. 727. Erskine, J., refused to put the prosecutor to elect as to which count he would proceed with.

(m) Rex v. Rooney, 7 C. & P. 517.

George and Henry Pritchard, it appeared that the prisoners attacked and robbed George and Henry Pritchard when they were walking together, Tindal, C. J., held that the prosecutor was not bound to elect as to which robbery he would proceed. It was all one act, and one entire transaction; the two prosecutors were assaulted and robbed at one and the same time, and there was no interval of time between the assaulting and robbing of the one and the assaulting and the robbing of the other. If there had been, the felonies would have been distinct, but that was not so in the present case. (n) So where the prisoner was indicted under the 8 & 9 Will. 3, c. 26, s. 1, for having in his possession an edger, contrived for marking money round the edges, and proof being offered that the prisoner had used this instrument for graining the edges of counterfeit half-crowns, it was objected that the act of coining being a species of treason higher in degree than the one the prisoner was charged with, the greater offence ought not to be given in evidence to prove the less; but Burrough, J., held that the evidence was admissible, as whatever went to prove that the prisoner was guilty of the offence he was charged with was evidence, however it might also go to show him guilty of another offence. (o)

The prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 37, for stealing from the mine of H. J. Gunning, coal, the property of H. J. G., and in the same count he was charged with stealing from the mines of thirty other proprietors other coal, the property of each of such proprietors. (p) The prisoner had been lessee of a mine, which he had been working from November 1842 till January 1848, and in opening the case it was stated that he had, from the shaft opened to work this mine, carried on extensive workings of coals by means of levels, driftways, tunnels, cuttings, and drains; and by means of these workings he had gotten coal belonging to about forty different proprietors, without their sanction or knowledge; and in doing so had undermined part of the yard of the parish church, 144 yards of the main street of Wigan, and 220 private houses; and he had unlawfully possessed himself of 10,000l. worth of the coal of other persons. It was urged that it was not competent to proceed under this indictment for felonies so entirely distinct. One of such felonies might have been committed upwards of four years before another of them, and by means of different workmen, and under the superintendence of different agents. Each severance of coal being a felony, there were thirty-one distinct felonies charged in each count, and if no restriction were put on the prosecution, there would be laid before the jury, and the

Several connected larcenies from a coal mine.

Littledale, J., added, 'I think it makes no difference that Urwick's watch is the subject of another indictment.' 'Suppose Mr. Urwick had not been there at all, and that when Woodward was robbed a watch had been under the seat of his gig, and that after the robbery he had discovered that the watch was missing, I have no doubt that evidence might be given of the loss of the watch at the place.'

(n) *Reg. v. Giddins*, C. & M. 634.

(o) *Rex v. Moore*, 2 C. & P. 235. R. v.

*Zeigert*, 10 Cox, C. C. 555.

(p) There were other counts charging the prisoner with the severing of coal with intent to steal, and with common larceny; and in each count the coal was laid as the property of H. J. G., and of the said thirty other separate and distinct owners. Quære whether all the counts, except those for common larceny, were not clearly bad, as charging thirty-one separate felonies which by no possibility could be committed together? C. S. G.

prisoner would have to answer, evidence relating to many thousands of distinct felonies. What would be an unanswerable defence to one charge, might be wholly inapplicable to another, and every defence might require a different set of witnesses. Erle, J., 'The question is, what, in such a case as this, is one entire transaction. It may be that the making a level, a tunnel, a drain, and a cutting, may all be necessary in order to take particular coal; if so, all would, I think, be part of one transaction, and might properly be given in evidence. I cannot interfere at present.' The evidence for the prosecution extended to all the operations mentioned in the opening of the case; to the getting the coal continuously during a period for upwards of four years, to operations conducted by different underlookers and by many different workmen, and to coals taken from the coal fields of thirty or forty different owners. On the case for the prosecution closing, the counsel for the prisoner urged that the prosecutor ought to elect some single charge; which he declined, unless directed so to do. Erle, J., 'I will not so direct; but for convenience sake the prisoner's counsel may address himself to the charge of stealing the coal taken under the churchyard. The whole workings may be relied on to show a felonious intent, though they may go into twenty different counties, and into the separate properties of twenty different persons, and extend over fifteen or twenty years, if the mining operations be continuous for that time;' and in summing up Erle, J., said, 'It has been urged that the taking of each day was a separate felony, and that only one felony could be inquired into by you on this indictment; but I should say that as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people. As, however, complaint was made by the counsel for the prisoner, I have thought it better that your attention should be confined to the charge of taking the coal of one owner; but in order to show that when the prisoner took the coal of Mr. Gunning he knew he was out of his boundary, I have permitted it to be proved that he has gone out of his boundary in many other instances, and into the property of many other persons, taking in all 15,000 yards of coal.' (q)

Where several felonies are in fact so mixed as not to be separated without inconvenience to the prosecutor, evidence of all may be admitted, and therefore letters referring to several transmissions of stolen goods from the principal to the receiver in such a case are admissible.

Upon an indictment against a son for stealing on the 20th of November, 1843, twenty-six pairs of boots, twenty pairs of shoes, and 128 pounds weight of leather, and against his father for receiving the said goods, knowing them to have been stolen, it appeared that the son from the beginning of March 1843 till the 10th of November following was in the employ of the prosecutors, who were curriers and dealers in boots and shoes. The two prisoners lived together at Kirkstall till the end of April; when the elder removed to Preston, taking with him a hamper, which passed and repassed afterwards repeatedly between the father and the son down to October. On the 10th of November the lodgings of the son at Kirkstall were searched, and a quantity of shoes and leather found there belonging to the prosecutors, and at the same time and place sundry letters were found from the father to the son, which induced the prosecutors to search the shop of the father at Preston,



and in that shop there were also found boots, shoes, and leather of the prosecutors of the value of about 150*l.*, and letters from the son to the father. It was proposed, on the part of the prosecution, to put in the letters, both from the father to the son and from the son to the father; these letters were dated at various periods between May and October following, and referred to the transmission from the son to the father of goods of the nature of those found in the father's house. It was objected that these letters could not be read, or at any rate not all of them. As they referred continually to the transmission of property, the effect of giving them in evidence would be to assist the proof of a single felony by proof of other felonies. It was answered that it did not appear that there had been more than one taking and one receiving; and at all events the letters were evidence against the father, as showing guilty knowledge. Maule, J., 'Judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment, where, as will often be the case, the effect of so doing will be to create confusion, or to surprise the prisoner, or otherwise embarrass the defence. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if more than one) took place. The whole seems to constitute a continuous transaction; therefore I shall admit evidence relating to any takings and receivings under the circumstances, provided the indictment contains corresponding charges.' (r)

It was formerly considered that if there were separate indictments for offences which constituted parts of the same transaction, evidence of an offence which was the subject-matter of one indictment was not admissible upon the trial of another. (s) But it has been since held in several cases that there being another indictment pending makes no difference. (t) And it has been laid down by a very learned judge that the correct rule in such cases is, that it is in the discretion of the judge to admit or reject evidence of other felonies which form the subject of other indictments, and that such discretion will be guided by the evidence appearing to be necessary or unnecessary in support of the indictment on which the prisoner is being tried. (u) Thus where there were three indictments against a prisoner for stealing notes from three letters, and it appeared that the prisoner stole notes out of one letter, and then opened another letter, and took out of it the notes it contained, and substituted for them notes to an equal amount out of the first letter, it was held on the trial for stealing the notes out of the first letter that the notes stolen out of the second letter might be traced to the prisoner, because such evidence was essential to the chain of facts necessary to make out the case. (v) But where on an indictment for night-poaching, in order to prove the identity of one of the prisoners, it was proposed to prove that a coat lost by one of the keepers on the occasion in question had been found in the house of that prisoner, there being a separate indictment for

Where other felonies are the subject-matter of other indictments.

(r) *Reg. v. Hinley*, 2 M. & Rob. 524. See *R. v. Firth*, 38 L. J. M. C. 54.

p. 372. See *R. v. Zeigert*, 10 Cox, C. C. 555.

(s) *Rex v. Smith*, 2 C. & P. 633.

(u) Per Patteson, J., *Rex v. Salisbury*, 1841 C. C. 5 C. & P. 155.

(t) See the cases, vol. 2, p. 728, and per Littledale, J., *Rex v. Rooney*, *ante*,

(v) *Rex v. Salisbury*, *supra*.

stealing the coat; Patteson, J., refused to receive the evidence, unless the prosecutor consented to an acquittal on the indictment for larceny. (w)

Evidence of other acts of prisoner as proof of his guilty knowledge.

Where it becomes necessary to prove a guilty knowledge on the part of the prisoner, evidence of other offences committed by him, though not charged in the indictment, is admissible for that purpose. Thus upon an indictment for uttering a forged bank-note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to show his knowledge of the forgery; (x) but not on an indictment for forgery. (y) So on a prosecution for uttering counterfeit money, it is the practice, for the purpose of showing a guilty knowledge, to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. (z) So, though on an indictment against a receiver for receiving several stolen articles, if it be proved that they were received at several times, the prosecutor may be put to his election, yet evidence may be given of all the receipts for the purpose of proving guilty knowledge. (a)

To prove knowledge of character.

On an information against a publican for unlawfully permitting prostitutes to assemble in his house, evidence that some of the same prostitutes had on other previous occasions been in the house is admissible, in order to prove his knowledge of their character. (c)

Cases of false pretences.

On an indictment for obtaining money on a chain by falsely pretending that it was a silver chain, it was held admissible to

(w) *Rex v. Westwood*, 4 C. & P. 547. In *Rex v. Salisbury*, *supra*, Patteson, J., stated that he refused to admit the evidence in this case on the ground that he did not think it necessary in support of the offence charged.

(x) See *Wylie's case*, 1 New Rep. 92. S. C. 2 Leach, 983, where per Lord Ellenborough, C. J. 'The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such case the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions? It would not make the evidence inadmissible. Such evidence may come out from these circumstances as to leave no doubt that the prisoners must have known what sort of paper they were passing.' *Rex v. Ball*, Russ. & Ry. 132. 1 Campb. 324. *R. v. Francis*, 12 Cox, C. C. 612. *R. v. Green*, 3 C. & K. 209. So the possession of other forged instruments may be proved as evidence of a guilty knowledge. *Rex v. Hough*, R. & R. 120; but there must be regular proof that they are forged, vol. 2, p. 728. *Rex v. Millard*, R. & R. 245. It seems that it may be proved that the prisoner had uttered forged bills or notes of a different kind, vol. 2, p. 729, as to the proof of an uttering the subject of another indictment to shew a guilty knowledge, see vol. 2, p. 731.

(y) *Wher*, in an action on several bills

of exchange drawn by one Skull, the question was whether the defendant had accepted them, and his name appeared on each as acceptor, and evidence was given for the plaintiff that the signatures were those of the defendant, and for the defendant that the signatures were forgeries, and the defendant proposed to prove that a number of bills and other papers had been taken away by the plaintiff's brother from Skull's house, and that among the bills so taken away were several bills on which the defendant's signature appeared, which signature was forged; and that the plaintiff had been circulating such forged bills since; and it was contended that the jury would be at liberty to infer that the bills on which the action was brought were part of the bills so taken from Skull's house; *Tindal*, C. J., rejected the evidence, and it was held that he was right in so doing, as clearly would have been inadmissible on an indictment for forgery. *Griffiths v. Payne*, 11 A. & E. 131.

(z) Vol. 1, p. 233, and see *Reg. v. Jarvis*, Dears, C. C. 552, vol. 1, p. 236, and *Reg. v. Weeks*, L. & C. 18. *R. v. Foster*, 24 L. J. M. C. 134. *R. v. Goodwin*, 10 Cox, C. C. 534.

(a) *Rex v. Dunn*, R. & M. C. C. R. 146. See *R. v. Oddy*, 2 Den. C. C. 264. See 34 & 35 Vict. c. 112, s. 19, noticed vol. 2, p. 485.

(c) *Parker v. Green*, 2 B. & S. 299. /

*g.B. Dec 88 note.*

prove that the prisoner a few days afterwards, offered a chain similar in appearance to another pawnbroker, requesting him to advance ten shillings upon it, and that twenty-six similar chains were found on the prisoner when he was apprehended. (d)

On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, which in fact was composed of crystals; it was held that evidence was admissible of a false pretence on a prior occasion to another person that a chain was gold, whereas it was plated, and on another distinct occasion that a ring was of diamonds, which it was not; and that it was no objection that the diamond ring spoken to on the prior occasion was not produced in court. (e)

If it be material to show the intent with which the act charged was done, evidence may be given of a distinct offence not laid in the indictment. Thus upon an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person. (f) So on an indictment for arson of a house, previous attempts to set it on fire have been held admissible, though not proved to have been made by the prisoner, for the purpose of showing that the fire was not accidental. (g) So on an indictment for setting fire to a rick by discharging a gun very near to it, evidence is admissible that it had been on fire the day before, and that the prisoner was then near it with a gun in his hand. (h) So where upon an indictment for robbery it appeared that the prisoners went with a mob to the prosecutor's house, and one of the mob went up to him, and very civilly, and, as the prosecutor then believed, with a good intention, advised him to give them something to get rid of them, and prevent mischief, upon which the prosecutor gave them the money laid in the indictment; it was held that for the purpose of showing that this was not *bona fide* advice, but, in reality, a mere mode of robbing the prosecutor, evidence was admissible of other demands of money made by the same mob at other houses, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present. (i) So upon an indictment for administering sulphuric acid to horses with intent to kill them, it has been held that the prosecutor is not confined to the proof of a single act of administering, but that other acts of administering may be given in evidence to show whether it was done with the intent charged in the indictment. (j) So where upon an indictment for robbing the prosecutor of his coat, the robbery having been committed by the prisoner's threatening to charge the prosecutor with an unnatural crime, Holroyd, J., received evidence of a second ineffectual attempt to obtain a 1*l*. note the following evening by similar threats, and upon a case re-

Proof of other acts of the prisoner as evidence of his guilty intent.

(d) Reg. v. Roebuck, D. & B. 24.

(e) R. v. Francis, 43 L. J. M. C. 97.  
See R. v. Holt, Bell, C. C. 280.

(f) Rex v. Voke, R. & R. 531.

(g) Reg. v. Bailey, 2 Cox, C. C. 311, Pollock, C. B. vol. 2, p. 923; and see Reg. v. Taylor, 5 Cox, C. C. 138, and other cases, vol. 2, p. 924.

(h) Reg. v. Dossett, 2 C. K. 306,

Maule, J. See R. v. Harris, 4 F. & F. 342. Wills on Circumstantial Ev. 47. R. v. Garner, 4 F. & F. 346.

(i) Rex v. Winkworth, 4 C. & P. 444, Parke, J. Alderson, J., and Vaughan, B., and Lord Tenterden, C. J., afterwards concurred in opinion.

Reg. v. M'Gee, 4 C. & P. 364, Park, J. A. J.

served the judges were of opinion that the evidence was admissible to show that the prisoner was guilty of the former transaction. (*k*) On a prosecution for a libel, the publication of other libels by the defendant, not laid in the indictment, may be given in evidence, to show *quo animo* the defendant published that in question. (*l*) On the trial of an indictment for murder, former grudges and antecedent menaces are admitted to be given in evidence as proof of the prisoner's malice against the deceased. (*m*) And it has been considered, in a case where three persons were charged with uttering a forged note, that other acts done by all of them jointly, or any of them separately, shortly before the offence, may be given in evidence to show the confederacy and common purpose, although such acts constitute distinct felonies. (*n*) On an indictment for sending a threatening letter, prior and subsequent letters, from the prisoner to the party threatened, may be given in evidence, as explanatory of the meaning and intent of the particular letter on which the indictment is framed. (*o*)

Evidence of one murder to show the motive for committing another.

Evidence of the murder of one person may be given upon the trial for the murder of another person, if such evidence tends to show that the prisoner might have had a motive arising out of the other murder for committing the murder with which he is charged. Upon an indictment for the murder of one Hemmings, it was opened that great enmity subsisted between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give 50*l.* to have him shot, and that the rector was shot by Hemmings, and that the persons who had employed him, fearing they should be discovered as having hired him to murder the rector, had themselves murdered Hemmings; and that Hemming's bones had been found in a barn occupied by the prisoner at the time of the murders. After evidence had been given of declarations of the prisoner, showing that he entertained malice against the rector, it was proposed to show that Hemmings was the person by whom the rector was murdered; it was objected that this was not admissible, as the rector's death was not the subject of the present inquiry. Littledale, J., 'I think that I must receive the evidence. On the part of the prosecution it is put thus—that the prisoner and others employed Hemmings to murder Mr. Parker, and that he being detected, the prisoner and others then murdered Hemmings, to

(*k*) *Rex v. Egerton*, R. & R. 375, S. C., mentioned by Holroyd, J., in *Rex v. Ellis*, *ante*, p. 370.

(*l*) *Ante*, p. 222. *Stuart v. Levell*, 2 Stark. N. P. C. 95. So subsequent letters relating to the same subject, although libellous themselves, are admissible in an action for a libel, and although such libel needs no explanation. *Pearson v. Lemaitre*, 5 M. & Gr. 700.

(*m*) 1 Phill. Ev. 476. So the declarations of the prisoner, and the seditious language used by him, are clearly admissible in evidence on an indictment for high treason, explaining his conduct, and shewing the nature and object of the conspiracy. *Rex v. Watson*, 2 Stark. N. P. C. 134. 1 Phill. Ev. 471. On a trial for murder, Cresswell

were rather inclined to reject evidence of what the prisoner had done to the deceased ten days before the cause of death, no declaration accompanying the act: neither the evidence proposed to be given nor the cause of death is stated. The objection was that the act done could have no tendency to show subsequent intention. *Reg. v. Mobbs*, 6 Cox, C. C. 223. In many cases evidence of previous violence has been given in cases of murder without objection, and such evidence clearly tends to prove ill-will.

(*n*) *Rex v. Tattersall*, MS. Bayley, J. Vol. 1, p. 157.

(*o*) *Robinson's case*, 2 Leach, 749. 2 East, P. C. c. 23, s. 2. p. 1110. *Ante*, p. 238.

prevent a discovery of their own guilt; now, to ascertain whether or not that was so in point of fact, it is necessary that I should receive evidence respecting the murder of Mr. Parker. (p)

Upon an indictment for murder by poisoning with arsenic, on the 3rd of November, 1816, evidence was given, without objection, that on the 19th of October previously the deceased drank tea with the prisoner, upon which occasion she was seized with sickness, and much indisposed; and that on the 3rd of November she again drank tea with the prisoner, and was afterwards taken ill in the same manner, but more violently than before. (q) So on an indictment for murder by prussic acid, administered in porter on the 1st of January, evidence was given, without objection, that in September previously the prisoner had visited the deceased and sent for some porter, and that after the prisoner left the deceased was very sick and ill. (r)

Of other poisonings.

If a person were charged with having wilfully poisoned another, and it was a question whether he knew a certain white powder to be arsenic, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of a distinct felony. (s)

To prove knowledge of a poison.

The prisoner was indicted for the murder of her husband, Richard Geering, in September, 1848, by arsenic. She was also charged in three other indictments with the murder of her son George by arsenic in December, 1848, of her son James by arsenic in March, 1849, and of an attempt to murder her son Benjamin by arsenic in April, 1849. (t) On the part of the prosecution evidence was tendered of a *post-mortem* analysis of the intestines, of the contents of the stomach, heart, &c., of Richard, James, and George, and also of a medical analysis of the vomit of Benjamin, who was still alive, in order to show that arsenic had been taken into the stomach of the three latter persons; that two of them had died of poison, and that the symptoms of all the four were the same. Evidence was also tendered that the four, during their lives, lived with the prisoner, and formed part of her family; that she generally made tea for them, cooked their victuals, and distributed the same to them on their leaving the house to go to their work in the morning. It was objected that the facts proposed to be proved took place after the death of the husband, and that the effect of them was to show that the three cases of poisoning were felonious. (u) It was answered that the evidence was admissible in order to prove, not that the prisoner had feloniously poisoned the deceased, but that the deceased had in fact died of poison administered by some one; and, secondly, for the purpose of proving that the death of the husband was not accidental. Pollock, C. B., 'I am of opinion that evidence is receivable that the death of the

Geering's case. Evidence of several poisonings after the one charged.

(p) *Rex v. Clewes*, 4 C. & P. 221.

(q) *Rex v. Donnell*, 2 C. & K. 308, note, Abbott, J.

(r) *Reg. v. Tawell*, 2 C. & K. 309, note, Parke, B.

(s) *Reg. v. Dossett*, 2 C. & K. 306, per Maule, J.

(t) Benjamin had stated to the surgeon who attended him, that his symptoms

were precisely the same as those exhibited by his father and his two brothers, and this statement had been reduced into writing, and read over to the prisoner, and she said, 'It is quite right.'

(u) It was conceded that the evidence would have been admissible had the death taken place previously to the death of the husband.

three sons proceeded from the same cause, namely, arsenic. The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony.' (v)

Evidence of  
a previous  
poisoning.

The prisoner and his wife were indicted for the murder of his mother by poison. The prisoner's former wife died in March, 1861, and his present wife was then their servant. The prisoner's mother lived with him after his second marriage, and died in December, 1861. He sold arsenic for agricultural purposes, and there was evidence of administration by the prisoners of articles of food in which arsenic might be contained, and of arsenical symptoms following. There was, however, evidence that three horses, one of them belonging to the male prisoner, had been accidentally poisoned by arsenic, and that some of his customers, against whom he was not supposed to have any ill-feeling, had suffered from arsenical symptoms, evidently arising from some accident; and it was held that, in order to prove that the administration of the poison to the mother was wilful, evidence was admissible of the circumstances which attended the death of the first wife, and to show that she had died of arsenic. (w)

The prisoner was indicted for the murder of Ann James, the keeper of an eating-house, of which the prisoner was the manager. She had had living with her Mrs. Townsend, William, Thomas, and Martin Townsend, and was visited by Jane Cafferata and her husband. Between September and the February following Mrs. Townsend, William, and Thomas Townsend, successively sickened and died, after very short illnesses, which in each case exhibited exactly similar symptoms. In February Mrs. James, who had long been ill, became worse, and so continued until June, when she died, and, on examination of her body, traces of a sufficient quantity of antimony to have caused death were found. The other bodies were examined, and all found to be saturated with antimony. Evidence given before the magistrate established in his opinion a *prima facie* case as to all four deaths against the prisoner. The prosecution proposed to give evidence of the three other deaths—1st, to exclude the supposition of accidental poisoning in the present case; 2nd, to show that the prisoner had then antimony

(v) *Reg. v. Geering*, 18 Law, J. (N. S.) M. C. 215. Pollock, C. B., who consulted Alderson, B., and Talfourd, J., and they agreed with him in opinion, and therefore the point was not reserved. The prisoner was executed. The C. B. spoke as if the third son had died whenever he mentioned the number of deaths. Upon the trial of a prisoner for the murder of her infant by suffocation in bed, held,

that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not shew the causes from which those children died. *R. v. Roden*, 12 Cox, C. C. 630. *R. v. Cotton*, 12 Cox, C. C. 400.

(w) *Reg. v. Garner*, 3 F. & F. 681, 4 F. & F. 346. Willes, J., after consulting Pollock, C. B.

in his possession, but this could only be done by proving that he administered *something* to two of them, and that antimony was found in them, and that they died of it ; 3rd, in order to exculpate Mrs. Cafferata, whom the prisoner charged with poisoning Mrs. James, it was material to prove that she could not possibly have poisoned one of the other three ; 4th, as it would be competent to the prisoner to prove that when all the others sickened and died he was absent and could not have poisoned them, so evidence might be given to prove that the prisoner poisoned the whole, from the four crimes being so connected as to be substantially but one transaction. With reference to the present question it was answered—1st, that the evidence would not exclude the supposition of accident in Mrs. James's case ; if the three others were wilfully poisoned by some one it would not prove as against the prisoner that Mrs. James's death was not accidental ; 2nd, that the mere fact of '*something*' being administered by the prisoner, and of antimony being found in the bodies, did not prove possession by the prisoner of antimony at the time of Mrs. James's death ; the '*something*' might have been exhausted by the three former poisonings ; 3rd, that evidence to exculpate Mrs. Cafferata was wholly collateral, unless the prisoner attempted to prove her guilt ; 4th, that the prisoner could not prove that he did not poison the three others. Martin, B., after consulting Wilde, B., refused to admit the evidence. (x)

So evidence may be given of other wounds inflicted by the prisoner on other persons at the same time and place for the purpose of identifying the instrument used. On an indictment for maliciously stabbing it appeared that the prisoner stabbed both the prosecutor and Redman at the same time and place, and it was held that evidence might be given of the shape of the wound inflicted upon Redman for the purpose of identifying the instrument with which the wound was inflicted on the prosecutor. (y) Where on a trial for murder it appeared that three grenades had been exploded, by one of which the deceased was killed, it was held that evidence of the nature of the wounds inflicted at the same time on other persons, who were killed or wounded, was admissible for the purposes of showing the character of the grenades, which were the first instruments of the kind which had been used. (z)

Of other wounds.

We have seen that on an indictment for embezzlement where the entries of sums were correct, but the castings up incorrect, a series of similar errors in casting up, both previously and subsequently to the cases to which the indictment referred, were held

To show that false entries were intentional.

(x) Reg. v. Winslow, 8 Cox, C. C. 397. The proposed evidence is not stated. This case is opposed to all the preceding cases, none of which was cited. At most it can only be taken to show that the learned judges in their discretion did not think fit to admit the evidence. With the utmost deference to their opinion, it seems to have been the very case in which the evidence ought to have been admitted ; for it would have most effectually tended to show that the opinion

of the medical men that the particular death was caused by poison, and that that poison was antimony, was correct. It would also have strongly tended to prove that the antimony was not taken accidentally. C. S. G.

(y) Rex v. Fursey, 6 C. & P. 81, Parke, J., and Gaselee, J.

(z) Reg. v. Bernard, 1 F. & F. 240, Lord Campbell, C. J., Pollock, C. B., Erle, J., and Cresswell, J.

admissible in order to negative the defence that these were merely accidental errors. (a)

Upon trial for arson.

Upon a trial for arson with intent to defraud an insurance company, evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession, was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident. (b) On an indictment for arson, one count laying an intent to defraud, and it being opened for the prosecution that the motive might have been to realize the money insured by the prisoner upon her goods, evidence was received that she was in easy circumstances, with a view to show that she was, at all events, under no pecuniary temptation to commit such an act. (c)

To explain facts.

Where on a trial for rape it was elicited on cross-examination that the act had not caused any pain, Rolfe, B., held that it might be proved on re-examination that the prisoner had done the same thing on previous occasions; for that evidence tended to explain the fact that the act in question had not caused any pain. (d)

To rebut an alibi.

On an indictment for robbery the defence was an alibi, and in order to show that the prisoner was near the place of the robbery at the time it was committed, Alderson, B., held that a witness might be examined to show not merely that he had been accosted by the prisoner on the road shortly before the prosecutor was robbed, but that he had also been in fact robbed by the party who accosted him. (e)

Where all the acts are part of the same transaction.

On an indictment for abusing a child under the age of ten years, the first occasion spoken to by the child was a Thursday morning, on which the prisoner threatened to beat her if she told, and it was held that evidence of subsequent perpetrations of the offence on Saturday and Monday was admissible. Willes, J., 'The practice is, no doubt, in the discretion of the Court, to call on the prosecution to elect, but that is a course never taken where the acts are all in substance part of the same transaction; and here, in my opinion, it is so. It has repeatedly appeared to me, in cases of this sort, that the man, by a threat of violence, deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction, which makes such evidence properly admissible.' (f)

Proof of other acts and declarations of prisoner as evidence for him of his innocence.

As other acts and declarations of the prisoner, besides those charged in the indictment, may be given in evidence on the part of the prosecution, so he himself in his defence may in some cases prove other acts and declarations of his own, as evidence of his innocence. Thus on a charge of murder, expressions of goodwill and acts of kindness on the part of the prisoner towards the deceased are always considered important evidence, as showing what was his general disposition towards the deceased, from which the jury may be led to conclude that his intention could not have

(a) Reg. v. Richardson, 2 F. & F. 343, vol. 2, p. 386. See R. v. Balls, 40 L. J. M. C. 148.

(b) R. v. Gray, 4 F. & F. 1102.

(c) R. v. Grant, 4 F. & F. 322.

(d) Reg. v. Chambers, 3 Cox, C. C. 92.

(e) Reg. v. Briggs, 2 M. & Rob. 199.

(f) Reg. v. Reardon, 4 F. & F. 76.



been what the charge imputes. (g) So in the case of *Rex v. Lambert*, (h) where the supposed libel, which was the subject of prosecution, was contained in a paragraph of a newspaper, of which the defendants were the printer and proprietor, Lord Ellenborough, C. J., held that the defendants had a right to have read in evidence any other paragraph in the same newspaper connected with the subject of the passage charged as libellous (although disjointed from it by extraneous matter, and printed in a different character) for the purpose of showing the intention and mind of the defendants with respect to the specific paragraph laid in the indictment. And as in trials for conspiracies, whatever the prisoner may have done or said at any meeting alleged to be held in pursuance of the conspiracy is admissible in evidence against him on the part of the prosecution, so, on the other hand, any other part of his conduct at the same meetings will be allowed to be proved on his behalf; for the intention and design of the party at a particular time are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. (i) In the case of *Walker* and others, who were tried for a conspiracy to overthrow the Government, and evidence was produced, on the part of the prosecution, to show that the conspiracy existed, and was brought into overt act at meetings in the presence of Walker, the counsel for the prisoners was allowed to ask a witness whether, at any of these times, he had ever heard Walker utter any word inconsistent with the duty of a good subject. The question was opposed, but held by Mr. J. Heath to be admissible. The prisoner's counsel were also allowed in the same case to inquire into the general declarations of the prisoner at these meetings, whether the witness had heard him say anything that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession. (j)

On the trial of *Hardy* for high treason, where the overt act charged was that the prisoner, for the purpose of accomplishing the treason of compassing the King's death, did conspire with others to call a convention of the people, in order that the convention might depose the King; the counsel for the prisoner were allowed to ask a witness whether, before the time of the convention which was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in that business. (k) But the better opinion seems to be that,

*Hardy's case.*

But such acts and declara-

(g) 1 Phill. Ev. 470.

(h) 2 Campb. 400, and see *Thornton v. Stephen*, 2 M. & Rob. 45. The same was done in *Newton v. Rowe*, Gloucester Spr. Ass. 1843, *cor. Erskine*, J. MSS. C. S. G. See *Pearson v. Lemaitre*, 5 M. & Gr. 700, *Camfield v. Bird*, 3 C. & K. 56.

(i) 1 Phill. Ev. 478.

(j) *Ibid.* and 23 St. Tr. 1131. See the observations of Alderson, B., in *Reg. v. Vincent*, 9 C. & P. 91.

(k) 24 How. St. Tr. 1097. On an indictment for a conspiracy against the defendant and Brown (who was gone to America) with intent to defraud Sir J. C.

of a sum of money advanced by him by way of annuity, some letters between the defendant and Brown were put in evidence on the part of the prosecution, and the defence was that the defendant had been made a dupe by Brown, and was not himself a participator in the fraud, and Lord Tenterden, C. J., held that, under the peculiar circumstances of the case, the whole of the correspondence between the defendant and Brown, on both sides, previously to the time of the execution of the annuity deeds, was admissible, but that all letters subsequent to that time were inadmissible. *Rex v. Whitehead*, 1 N. P. R. 61. S. C.

tions of the prisoner must be connected with the facts proved against him.

in order to make such other acts or declarations of the prisoner applicable to his defence, it must be shown that they are in some way connected with the facts proved against him. (*l*) In the case of *Horne Tooke* and others, however, for high treason, several publications having been given in evidence on the part of the Crown, containing republican doctrines and opinions, the distribution of which had been promoted by the prisoners during the period assigned in the indictment for the existence of the conspiracy, the prisoner was allowed to read in his defence various extracts from works which he had published at a former period of his life; and these the jury were permitted to carry along with them when they retired to consider of their verdict. (*m*) But the propriety of allowing such a defence has been questioned by very high authority. (*n*)

Evidence of several transactions when cumulative instances are necessary to prove the offence charged.

It may also happen that, from the nature of the offence charged, it is impossible to confine the evidence to proof of a single transaction. Thus on an indictment against several defendants for a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, Lord Ellenborough allowed the prosecutor to prove various instances of their giving false representations of their circumstances; (*o*) observing that the indictment was for a conspiracy to carry on the business of common cheats, and cumulative instances were necessary to prove the offence. The same sort of evidence, said his lordship, is allowed on an indictment for barratry; (*p*) and in a prosecution for high treason itself, the gravest of all offences.

Cases as to the relevancy of evidence.

The rule is clear and general, that no question can be put which is not relevant to the issue (unless for the purpose of impeaching the credit of a witness); but the applicability of the rule must obviously depend upon the particular circumstances of each individual case, and will not admit of a general demonstration. It may, however, be useful to state some criminal cases, where questions as to the relevancy of evidence have arisen and been decided. On the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent and disaffection, it would be irrelevant to inquire, on behalf of the defendants, what the conduct of those, employed to disperse the meeting, may have been at the time of the dispersion, if no evidence has been previously offered, on the part of the prosecution, as to the conduct of the meeting at that time or subsequently; for the conduct of the dispersers of the meeting can have no bearing on the intention and object of the meeting itself; in other words, it is irrelevant to the matters at issue. (*q*) In such a prosecution, as the material points for the consideration of the jury are, the general character and intention of the assembly, and

Unlawful assembly.  
Hunt's case.

(*l*) *Rex v. Lambert*, 2 Campb. 400. Lord George Gordon's case, 21 How. St. Tr. 542. *Hanson's case*, 31 How. St. Tr. 4281. 1 Phill. Ev. 480.

(*m*) 1 East, P. C. c. 11, s. 8, p. 61. 25 How. St. Tr. 545.

(*n*) By Lord Ellenborough in *Rex v. Lambert*, 2 Campb. 400.

(*o*) *Rex v. Roberts*, 1 Campb. 400, *ante*, p. 151. But see *Reg. v. Steel*, C. &

Mars. 337, *ante*, p. 151.

(*p*) The prosecutor must, before the trial, give the defendant a note of the particular acts of barratry he intends to prove against him; and will not be at liberty to give evidence of any other. Vol. I. p. 362.

(*q*) *Rex v. Hunt*, 3 B. & A. 566, 577. 1 Phill. Ev. 476. See also *Redford v. Burley*, 3 Stark. N. P. C. 87, 88, 91.

the particular case of each defendant as connected with that general character, it would be relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner, and acting in concert. It would be relevant also to show, that early on the day of the meeting, in a spot at some distance from the place of meeting (from which very spot a body of men came afterwards to the place of meeting), a great number of persons, so organized, had assembled, and had there conducted themselves in a disloyal, riotous, or seditious manner. (r) Further, it would be relevant, on such trial, to produce in evidence certain resolutions, which had been proposed, by one of the defendants, at a large assembly in another part of the country, very recently held for the same professed object and purpose as were avowed by the meeting in question, that defendant having acted at both meetings as president or chairman; in a question of intention as this is, it is most clearly relevant to show, against that individual, that, at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. (s)

In cases of treason and felony, it may be proved that articles were found secreted in the prisoner's house, after his apprehension. In *Watson's case*, evidence was admitted that a quantity of pikes had been found secreted in the prisoner's house subsequently to his apprehension. (t) With respect to writings found after the prisoner's apprehension, it appears to have been laid down in *Hardy's case* (u) that papers found in the possession of conspirators with the prisoner, but subsequently to his apprehension, ought not to be read against him, unless there was evidence to show their previous existence; for otherwise there was no evidence that the prisoner was a party to it. And on a prosecution for a conspiracy, it was held that some letters which were directed to the prisoners and intercepted at the post-office after their apprehension, were not admissible in evidence against them, as they had never been in the custody of the prisoners, or in any way adopted by them. (v) So on an indictment for uttering a forged bank-note, knowing it to be forged, it was held that a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction at the prisoner's lodgings, after he was apprehended, and during his confinement, but never actually in his custody, could not be read in evidence as proof of his knowledge that the note was forged. (w) But in *Watson's case* (x) it was held that papers found

Articles found in prisoner's house after his apprehension.

Writings found after prisoner's apprehension.

(r) *Ibid.*

(s) *Rex v. Hunt*, 3 B. & A. 566, 577. 1 Phill. Ev. 477. See also *Redford v. Burley*, 3 Stark. N. P. C. 87, 88, 91.

(t) 2 Stark. N. P. C. 137. Lord Ellenborough, in giving his opinion on this point, cited a case from recollection, where a butler to a banker at Malton had been taken up upon suspicion of having committed a great robbery; the prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel, who considered the case during the assizes at York; at their instance, search was made, and in the privy all the plate was found, the plate was produced, and the prisoner

was in consequence convicted; he had been separated from the custody of the plate, since he had been confined in York Castle for some time: but no doubt was entertained as to the admissibility of the evidence. Abbott, C. J., also observed, that an assize had scarcely ever occurred where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house after his apprehension. See *Reg. v. Courvoisier*, 9 C. & P. 362.

(u) 24 How. St. Tr. 452.

(v) *Rex v. Hevey*, 1 Leach, 237. See *R. v. Clancy*, 3 B. & A. 388.

(w) *Huet's case*, 2 Leach, 820.

(x) 2 Stark. N. P. C. 140.

Writings found in prisoner's possession, though not published, may be read if relevant to the charge in the indictment.

in the lodgings of a conspirator at a period subsequent to the apprehension of the prisoner might be read in evidence, although no absolute proof was given of their previous existence, where strong presumption existed that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers were intimately connected with the objects of the conspiracy as detailed in evidence. (y) Writings found in the prisoner's possession, but not published, if plainly connected with the treasonable design charged, are evidence of such design upon an indictment for treason, though not published. (z) But it seems that, if it be doubtful whether they are so connected, they are not admissible. (a) In *Watson's case*, one of the objections made to the admission of a paper found in the house of a co-conspirator was, that there was no proof that it had been published; and *Sidney's case* was cited: but the Court distinguished that case from the present, and Abbott, J., said that he had always understood the ground of objection in *Sidney's case* was, not that the papers had never been published, but that they had no relation to the treasonable practices charged in the indictment, and he referred to 1 *East's P. C.* 119, where it is said, 'writings plainly applicable to some treasonable design in contemplation are clear and satisfactory evidence of such design, although not published.' If, say Mr. J. Foster and Mr. J. Blackstone, 'the papers found in Sidney's closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him.' That was the objection which had constantly been made to the reception of the evidence in *Sidney's case*. The paper there was not only an unpublished paper, but appeared to have been composed several years before the crime charged to have been committed. (b)

So where on a trial for murder committed by the explosion of grenades, it appeared that the grenades had been ordered by Allsop, and, after the apprehension of the prisoner, a letter was found in the prisoner's house, which was in the handwriting of Allsop, and bore a memorandum in the handwriting of the prisoner. It was held that the letter was admissible. It must be assumed to have been in the prisoner's possession, and it must be admitted, not on the ground that the writer of it was a co-conspirator with the prisoner, but on the ground that it was in the prisoner's possession, and that its contents were relevant to the present inquiry. (c) But where on an indictment for fitting out a ship to

(y) A letter found upon the prisoner may be read, but it is no evidence of the facts it states. Thus on an indictment against a person employed in the post-office for secreting a letter containing a bill of exchange, the contents of the letter, which was found upon him, were held inadmissible to prove that the bill was enclosed in it. *Rex v. Plumer*, R. & R. 264.

(z) *Rex v. Watson*, 2 Stark. N. P. C. 141.

(a) *Ibid.*

(b) 2 Stark. N. P. C. 147.

(c) *Reg. v. Bernard*, 1 F. & F. 240, Lord Campbell, C. J. Per Holt, C. J.

Erle, J., and Cresswell, J. The letter alluded to the assassination of the Emperor of the French. But where two prisoners lodged together, and a port-manteau was found in their lodgings, which Rehden said was Hare's, and the prosecutor's invoice of the stolen shawls was found in it, and also a paper folded in the shape of a letter, and indorsed in Rehden's handwriting, 'J. Rehden, private,' and inside this was an inventory of the shawls that had been pawned, but this was not in Rehden's handwriting; it was held that this inventory was not admissible; for *non constat* that the words 'private' and the prisoner's name might

be employed in the slave trade, the prisoner was a merchant in London, and the ship was seized off the coast of Africa, several letters then found on board of her were held inadmissible, as they were not traced in any way to his knowledge. (*d*)

The prisoner inserted an advertisement in a newspaper offering employment to persons who would transmit him one shilling's worth of postage stamps, and giving an address. The advertisement contained false statements, and upon his being apprehended six envelopes addressed to him, and containing a reply to the advertisement, and a shilling's worth of postage stamps were found upon him. 281 other letters, contained in a sealed bag, were produced on the trial by a clerk from the post-office, and on the bag being opened, the letters were taken out and read, and appeared to be addressed to the prisoner replying to his advertisement, and enclosing each one shilling's worth of postage stamps. These 281 letters had been stopped and opened by the post-office authorities before delivery to the prisoner, and had never been in his possession, or their contents brought to his knowledge; nor was there any proof as to their authenticity or otherwise. Held, that they were admissible against the prisoner on an indictment charging him with obtaining and attempting to obtain money by false pretences from four persons other than the writers of the letters. (*e*)

If the papers found in the prisoner's custody be plainly relative to the design charged, they may be read in evidence without any proof of the handwriting being that of the prisoner. (*f*).

On an indictment against a county for not repairing a public bridge, the defendants may show under the general issue that the bridge had been repaired from time to time by private individuals: for one question is, whether the bridge is a public bridge; and upon that question it is material to inquire, by whom and in what manner it had been repaired, with a view of ascertaining whether those repairs were adapted to the service of the public, or merely to the purposes of ornament or private convenience. (*g*) It is one medium of proof to show that the bridge has been repaired by individuals, though that alone would be of very little weight. (*h*)

In a question put by the House of Lords to the judges, in the course of the proceedings in the *Queen's case*, it was assumed that proof of the existence of a conspiracy between the prosecutor and others to suborn witnesses against the accused is a legitimate ground of defence. Lord Chief Justice Abbott, in delivering their opinion, observed, that the judges understood that such an assumption had been made in the question put to them, and that the House did not ask their opinion on that point; (*i*) from which it may perhaps be inferred, that their lordships had doubts whether such a defence is allowable.

Without proof of being in prisoner's handwriting. On an indictment against a county for not repairing a bridge, evidence may be given that individuals have repaired it.

Whether a prisoner may in his defence give evidence of a conspiracy to suborn witnesses against him.

not have been written previously to the writing on the other side. *Reg. v. Hare*, 3 Cox, C. C. 247. The Common Serjt., after consulting Maule, J., and Wightman, J. But quære whether, as the portmanteau was in the prisoner's lodgings, they were not both of them in possession of its contents? If the shawls had been in the portmanteau, would they not have been in the posses-

sion of both prisoners? C. S. G.

(*d*) *Reg. v. Zulueta*, 1 C. & K. 215, Maule, J., and Wightman, J.

(*e*) *R. v. Cooper*, 45 L. J. M. C. 15.

(*f*) 1 East, P. C. c. 11, s. 56, p. 119.

(*g*) *Rex v. (Inhab.) Northamptonshire*, 2 M. & S. 262.

(*h*) 1 Phill. Ev. 170, 7th ed.

(*i*) *The Queen's case*, 2 B. & B. 310.

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Evidence of  
character.

Character of  
prosecutor.

In criminal proceedings, when the prosecutor is a witness, his character may be attacked in the prisoner's defence, in the same way as is applicable to the impeachment of the credit of witnesses generally. In the particular instance of an indictment for a rape, or for an assault with an intent to commit a rape, evidence is admissible on the part of the prisoner, not merely, as in the case of an ordinary witness, that from her general bad character the prosecutrix ought not to be believed on her oath, but her character as to general chastity may be impeached by general evidence. (*k*) And the prosecutrix may be cross-examined as to particular discreditable transactions, (*l*) and as to her having had connection with the prisoner previously to the alleged rape; (*m*) and if she deny such connection, the prisoner may show that she has been previously connected with him. (*n*) On an indictment for an indecent assault, as in cases of rape, or attempt to commit rape, the answer of the prosecutrix to questions put to her on cross-examination as to particular acts of connection with persons named to her, other than the prisoner, is final, and the party questioning is bound thereby, and if her answer be a denial the persons named cannot be called to contradict her. (*o*)

Evidence of  
prisoner's  
good cha-  
racter ;

must be appli-  
cable to the  
charge ;

must not refer  
to particular  
acts.

In all criminal prosecutions the prisoner is always permitted to call witnesses to speak to his general character, (*p*) who are usually examined in his behalf, as to how long they have known him, and what his general character for honesty, humanity, or peaceable conduct (according to the nature of the offence charged) has been during that time. The inquiry ought manifestly to bear some analogy and reference to the nature of the charge against the prisoner. On a charge of stealing it would be irrelevant and absurd to inquire into his loyalty or humanity ; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. (*q*) The inquiry must also be made with reference to the general character of the prisoner ; for it is general character alone which can afford any test of general conduct, or raise a presumption that the person, who had maintained a fair reputation down to a certain period, would not then begin to act an unworthy part : and, therefore, proof of particular transactions, in which the prisoner may have been concerned, is not admissible. (*r*)

Cross-exami-  
nation as to  
character.

It is not the practice to cross-examine witnesses to character unless there be some definite charge against the prisoner, to which to cross-examine them. (*s*) But where a witness for the prisoner

(*k*) Vol. 1, p. 868.

(*l*) *Rex v. Barker*, 3 C. & P. 589, vol. 1, p. 868.

(*m*) *Rex v. Martin*, 6 C. & P. 562, vol. 1, p. 868.

(*n*) *Rex v. Aspinall*, 3 Stark. Ev. 952, vol. 1, p. 868.

(*o*) *R. v. Holmes*, 41 L. J. M. C. 12 ; 12 Cox, C. C. 137. Semble, that the question may be put to her on cross-examination, but that she is not bound to answer it.

(*p*) Formerly evidence of the prisoner's good character was admitted in capital cases only, *in favorem vite*. *Rex v. Harris*, 2 St. Tr. 1038. This evidence is

now admitted in all prosecutions which subject a man to corporal punishment ; but not in actions or informations for penalties, though founded on the fraudulent conduct of the parties. *Peake's Ev.* 7. The true line of distinction, *Eyre, C. B.*, observed, is this : in a direct prosecution for a crime such evidence is admissible ; but where the prosecution is not directly for the crime, but for the penalty, it is not. *Attorney-General v. Bowman*, cited 2 B. & P. 582.

(*q*) 1 Phill. Ev. 469.

(*r*) *Ibid.* *R. v. Rowston*, *post*, 389.

(*s*) *Rex v. Hodgkiss*, 7 C. & P. 298, *Alderson, B.* It sometimes, however, is

having proved that he had known him for some years, and given him a good character, stated, on cross-examination, that he had never heard anything against him; but admitted that he had heard of a robbery, which had taken place in the neighbourhood some years previously; and was then asked, 'Did you ever hear that the prisoner was suspected of having done it?' it was objected that it was not competent to inquire about particular offences imputed to the prisoner. Parke, B., 'The question is not whether the prisoner was guilty of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one. The question may be put.' (t)

As to the course to be pursued where upon the trial of a person for any subsequent offence, he gives evidence of his good character, see vol. I, p. 67. If a prisoner cross-examines the witnesses for the prosecution as to his character, he 'gives evidence' within the meaning of these sections, and the previous conviction may be proved. (u)

Where prisoner on trial for a subsequent offence.

The prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by calling witnesses in support of it; and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put in issue, but coming in collaterally. (v)

Evidence in reply of prisoner's bad character.

If a prisoner on his trial gives evidence that his character is good, it is open for the prosecution, by way of reply, to prove that the prisoner's character is bad—Martin, B., dubitante. Evidence of character must not be evidence of particular facts, but (by all the Court, except Erle, C. J., and Willes, J.,) must be evidence of general reputation only, having reference to the nature of the charge. On a trial for an indecent assault, where the defendant had given evidence of his good character, a witness called by the prosecution to rebut such evidence, was asked, 'What is the defendant's general character for decency and morality of conduct?' The witness said, 'I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality.' Held, by the majority of the judges, that this answer was not admissible in evidence. (w)

Where on an indictment for stealing a shawl evidence of the prisoner's good character was given, it was held that evidence of

proper to ascertain from the witnesses whether they have had sufficient opportunities of knowing the prisoner's character; as whether they have lived near him, or known him down to the time of the commission of the offence. C. S. G.

(t) Reg. v. Wood, 5 Jurist, 225.

(u) Reg. v. Gadbury, 8 C. & P. 676. Reg. v. Shrimpton, 2 Den. C. C. 319.

(v) Bull. N. P. 296, citing Martyn v. Hind. Cowp. 437. The ordinary course, however, is to ask the witness in examination whether he has not heard

that the prisoner has been tried for a particular offence. Rex v. Hodgkiss, 7 C. & P. 298, Alderson, B.

(w) R. v. Rowton, 34 L. J. M. C. 57; 10 Cox, C. C. 25. Per Erle, C. J., and Willes, J., a witness's individual opinion respecting the general character and disposition of the prisoner with reference to the charge is admissible, although such witness knows nothing of the prisoner's general reputation. See R. v. Burt, 5 Cox, C. C. 284; R. v. Hughes, 1 Cox,

stealing another shawl on the same evening was not admissible in answer to the evidence of character. (x)

On the trial of a prisoner for wounding a constable who had arrested him on suspicion of felony, the following questions, in order to assist in showing that there were reasonable grounds for the arrest, was put to the constable on the part of the prosecution, 'What do you know had been the prisoner's previous character?' The answer was, 'I know the prisoner to be a very bad character.' It was held by the Court that this question ought not to have been put in the examination-in-chief, although it was open to the prisoner to have cross-examined the constable as to the grounds of his suspicion. (y)

Reply.

Soon after the passing of the 6 & 7 Will. 4, c. 114, the Act allowing persons indicted for felony to make their defence by counsel or attorney, the judges promulgated, amongst others, the following rule of practice in cases of felony, that, 'if the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do.' (z) And it has been since held in a case of felony that the counsel for the prosecution has in strictness the right to reply, (a) on the whole

(x) *R. v. Rogan*, 1 Cox, C. C. 291, Erle, J.

(y) *R. v. Turberfield*, 34 L. J. M. C. 20, and 10 Cox, C. C. 1. With all deference it is submitted that this decision is erroneous. Every constable is justified in arresting any person whom he has reasonable grounds to suspect of having committed a felony; and in every case where the question arises whether he had such reasonable grounds of suspicion, it is perfectly clear that it is competent to prove the grounds of such suspicion; otherwise a right to apprehend would exist without the power of justifying the arrest. In civil cases (unless the defendant be authorized to plead the general issue by statute) the grounds of suspicion *must* be alleged in a plea to an action for the arrest; *Davis v. Russell*, 5 Bingh. R. 354; *Hailes v. Marks*, 7 H. & N. 56; and the reason is that, whether there were reasonable grounds of suspicion is a mixed question of law and fact. *West v. Baxendale*, 9 C. B. 141; and as where the grounds of suspicion are alleged in a plea, they must be proved on the trial; so where the general issue is given by statute, they must be proved on the trial, *Davis v. Russell*, *supra*; and so in a criminal case like the present the grounds of suspicion must be proved, in order that the jury may determine whether in fact the grounds existed, and that the Court may decide, if they did exist, whether they were reasonable grounds. If a witness were asked whether he had reasonable grounds of suspicion, the question would clearly be erroneous; as the answer would be a conclusion of

law and fact. In these cases 'the question is on what grounds and motives the constable acted at the time,' per *Burrough, J.*, *Davis v. Russell*. Now it cannot be doubted that the bad character of the party may form one ground of suspicion: and the ordinary rule applicable to the receipt of evidence of character is that general evidence is alone admissible; but in a case like the present, as both the general character of the party and particular facts might operate on the mind of the constable, it is plain that evidence of both would be admissible. It is obvious too that the general character of the party might be infamous, and yet the constable might himself know nothing of such general character except from what he had been told by others; to limit the question, therefore, to what the constable knew of the prisoner would be to exclude all evidence of his general character, which possibly formed a most material ground of suspicion. Lastly, evidence of the character or conduct of a prisoner is always admissible in order to show that the acts of others, especially of officers of justice, are lawful; which is a totally different issue from that raised as to the guilt of the prisoner, though that issue may depend upon the other. C. S. G. See vol. 1, p. 625.

(z) Rules of Practice in cases of felony, promulgated by the Judges before the Spring Circuit of 1837. 7 C. & P. 676, *post*, ch. 3, s. 1.

(a) *Rex v. Stannard*, 7 C. & P. 673, *Patteson, J.*, and *Williams, J.*



case, and not merely on the evidence to character, (b) although the counsel for the prisoner only calls witnesses to character ; but this is not a right which in practice ought to be exercised, except under very special circumstances. (c)

The practice in cases of misdemeanor has uniformly been that when witnesses have been called, on the part of the accused, to character only, and for no other purpose, the counsel for the prosecution has not addressed the jury in reply, (d) but it seems that in strictness the right exists in cases of misdemeanor, though it ought rarely, if ever, to be exercised. (e)

It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration ; but that when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail ; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion, upon the whole of the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer. (f)

Method of leaving evidence of prisoner's character to the jury.

### SEC. III.

#### *What Allegations must be proved, and what may be rejected.*

In the present section it is proposed to consider, 1st, What allegations in an indictment must be proved to support it, and what may be disregarded in evidence ; and, therewith, of the subjects of surplusage, and the divisibility of averments. 2ndly, With what precision those allegations, which cannot be disregarded in evidence, must be proved ; and, therewith, of the subject of variance.

(b) *Rex v. Whiting*, 7 C. & P. 771, Bolland, B.

(c) *Rex v. Stannard*, *supra*.

(d) Per Patteson, J., in *Rex v. Stannard*, 7 C. & P. 673.

(e) *Rex v. Stannard*, *supra*, per Patteson, J., and Williams, J.

(f) In *Rex v. Stannard*, 7 C. & P. 673, Patteson, J., said, 'I cannot in principle make any distinction between evidence of facts and evidence of character ; the latter is equally laid before the jury as the former, as being relevant to the question

of guilty or not guilty ; the object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case.' And per Williams, J., 'It is evidence to be submitted to the jury, to induce them to say whether they think it likely that a person with such a character would have committed the offence.'

1st. What allegations must be proved.

Surplusage. Examples of surplusage.

Descriptive averments. No allegation can be rejected which is descriptive of the identity of any thing essential to the charge.

1st. What allegations must be proved, and what may be disregarded in evidence. In order to convict a man of an offence, all the material facts which constitute the offence, and which are necessary to enable the parties to avail themselves of the verdict and judgment, should the same charge be again brought forward, must be stated upon the indictment; and all these requisite allegations must be satisfied in evidence, and proved as laid. But allegations not essential to such a purpose, which might be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence. (*j*) Thus where Pye was convicted upon an indictment, which charged him with robbing Fernyhough *in the dwelling-house* of Aaron Wilday, and it was proved that the robbery was committed in a house, but it did not appear who was the owner of it; on reference to the judges, they all held the conviction proper. (*k*) Upon an indictment on the 8 & 9 Will. 3, c. 26, s. 1 (now repealed) for having a die *made of iron and steel* in possession, without lawful authority, the judges, on a case reserved for their opinion, held that, as it was immaterial to the offence of what the die was made, proof of a die, either of iron or steel, or both, would satisfy this charge. (*l*) So where the indictment was upon the repealed statute 4 Geo. 2, c. 32, 'for stealing so much lead belonging to the Rev. G. C. W., and then and there fixed to a certain building called Hendon Church,' Buller, J., thought the charging the lead to be the property of any one was absurd and repugnant, property (in this respect) being only applicable to personal things; that it should only have been charged to be lead affixed to the church; and that, therefore, the allegation as to property ought to be rejected as surplusage. (*m*)

In considering the subject of surplusage, it must always be remembered that it is a most general rule that no allegation, whether necessary or unnecessary, which is *descriptive* of the *identity* of that which is legally essential to the charge in the indictment, can ever be rejected. (*n*) Thus if a man were to be charged with stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected. (*o*) So upon an indictment under the 57 Geo. 3, c. 90 (now repealed), for being found armed with intent to destroy game in a certain wood 'called *the old walk* of, and belonging to, and then in the occupation of, John James, Earl of Waldegrave,' it was proved that the wood in question was in the occupation of the

(*j*) *Rex v. Holt*, 2 Leach, 593. 5 T. R. 446. 1 Phill. Ev. 493. Summers' case, 2 East, P. C. c. 16, s. 168, p. 785. Wardle's case, R. & R. 9. S. C. 2 East, P. C. c. 16, s. 168, p. 785.

(*k*) Pye's case, 2 East, P. C. c. 16, s. 168, pp. 785, 786. S. P. by all the judges in Johnstone's case, *ibid.* See Minton's case, 2 East, P. C. c. 21, s. 5, p. 1021.

(*l*) *Rex v. Oxford*, R. & R. C. C. R. 382. *Rex v. Phillips*, *ibid.* 369.

(*m*) *Rex v. Hickman*, 1 Leach, 318. S. C. 2 East, P. C. c. 16, s. 31, p. 593. On the authority of this case, Holroyd, J., doubted whether, on an indictment on

the repealed stat. 3 Will. & M. c. 9, s. 5, for stealing in a lodging let to the prisoner, the allegation of the person *by whom* the lodging was let might not be rejected as surplusage. *Rex v. Healey*, R. & M. C. C. R. 1.

(*n*) 1 Stark. Ev. 628.

(*o*) 1 Stark. Ev. 374, 2nd ed. See upon an indictment for stealing four *live* tame turkeys, the judges held that the word 'live,' being a description of the quality of the thing stolen, could not be rejected as surplusage. *Rex v. Edwards*, R. & R. 497.

Earl of Waldegrave, but it was also proved that the wood had always been called the *long* walk, and had never been called or known by the name of the *old* walk. And upon a case reserved for the opinion of the judges, it was held that, though it is not necessary, where the name of the owner or occupier of the close is stated, to state the name of the close also, yet that the averment could not be rejected, and the variance was fatal. (p) So where the indictment was for breaking, &c., the house of J. Davis, 'with intent to steal the goods of J. Wakelin, in the said house being,' and there was no such person who had goods in the house, but J. W. was put by mistake for J. D., the prisoner was held entitled to an acquittal; and it was ruled that the words 'of J. W.' could not be rejected as surplusage, for the words were sensible and material, it being material to lay truly the property in the goods; and without such words the description of the offence would be incomplete. (q) This is not like the case of laying a robbery in the dwelling-house of A., which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery. (r) Where an indictment for stealing a bank note described it as signed by A. Hooper, for the Governor and Company of the Bank of England, it was held by the judges, on a case reserved, that there could be no conviction without evidence of the signature being by A. Hooper. (s)

So the name of the person in whom the property which is the subject of the charge is laid, or on whom the offence is stated to have been committed, cannot be rejected as surplusage, but must be proved, both as to Christian and surname, according to the indictment; for if the names there stated are not his real names, or the names by which he is usually known, the prisoner must be acquitted (t) unless the indictment be amended under the 14 & 15 Vict. c. 100, s. 1, as it ought to be in such a case. But if there be a sufficient description of the person and degree of the owner of the property, which is supported in evidence, and subsequent addition may, it seems, be rejected as surplusage. Thus where in an indictment for larceny, before the Irish union, the goods stolen were stated to be the property of 'James Hamilton, Esq., commonly called Earl of Clanbrassil, in the kingdom of Ireland,' and it appeared in evidence that the prosecutor was an Irish peer, viz., Earl of Clanbrassil, in Ireland, the judges, on a case reserved, were of opinion that, though the correct mode of describing the person of the prosecutor would have been James Hamilton, Esq., Earl of Clanbrassil, in the kingdom of Ireland,' yet as 'James Hamilton, Esq.,' was a sufficient description of his person and degree, the subsequent words, 'commonly called Earl of Clanbrassil, in the kingdom of Ireland,' might be rejected as surplusage. (u)

Name of the party.

(p) *Rex v. Owen*, R. & M. C. C. R. 118. See *Duroure's case*, 1 East, P. C. 415. S. C. 1 Leach, 351; *Pye's case*, and *Johnstone's case*, *ante*, p. 392.

(q) *Jenk's case*, 2 East, P. C. C. 15, s. 25, p. 514. So also on an indictment for burglary, where the name of the owner of the dwelling-house is mis-stated, the error is fatal. Vol. 2, p. 44.

(r) *Ibid*.

(s) *Rex v. Craven*, R. & R. 14.

(t) See vol. 1, p. 58, as to variances in respect of the name of the party injured.

(u) *Rex v. Graham*, 2 Leach, 547. From what is said in the latter part of the opinion of the judges, as delivered by *Perryn, B.*, it is not clear whether their lordships thought the words stated

Conviction  
*pro tanto*.

It is sufficient  
to prove so  
much of the  
indictment as  
constitutes a  
crime punish-  
able by law.

Although it be true, as above stated, that in order to convict a man of an offence, that offence must be completely averred in the indictment, and the evidence must correspond with, and support, the whole of the material averments; yet it by no means follows that it is necessary to prove the offence charged in the indictment *to the whole extent laid*, for it is fully settled that in criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. (v) 'The distinction,' said Lord Ellenborough, in the case of *Rex v. Hunt*, (w) 'runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified.' (x) On a charge of petit treason, if the killing with malice were proved, but no circumstance of aggravation were proved to make the offence treasonable, the prisoner might have been found guilty of the murder. (y) If A. be charged with the murder of B., *i. e.* with feloniously killing B. of malice prepense, and all but the fact of malice prepense be proved, A. may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge; A. is fully apprised of the nature of it, the verdict enables the Court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts. (z)

On an indictment for burglary and stealing goods, if it appear that no burglary was committed—as where the breaking and enter-

above should be rejected as surplusage, or only the words 'commonly called.' Where the prisoner was indicted for stealing goods, the property of Andrew Wm. Gother, Esq., and it appeared that the prosecutor was not an esquire, it was objected that it was a fatal variance; but Borrough, J., overruled the objection, and held that the addition of esquire to the name of the person in whom the property was laid, was mere surplusage. *Rex v. Ogilvie*, 2 C. & P. 230. *Reg. v. Keys*, 2 Cox, C. C. 225, Wilde, C. J., S. P. It has been said, however, that where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and that if he be described as a knight, when in fact he is a baronet, or the contrary, the variance would be fatal; because a name of dignity is not merely an addition, but is actually part of the name, Arch. Cr. P. 30.

(v) *Rex v. Hollingberry*, 4 B. & C. 329. This rule, however, must be understood, as it should seem, with this qualification; that if a prisoner be indicted for murder or felony, he cannot be convicted of a misdemeanor, except it be an attempt to commit the offence charged. See vol. I, p. 62. Thus where upon the facts stated upon a special verdict upon an indictment for felony, the Court of King's Bench was of opinion that the prisoner could not be convicted of felony, Lee, C. J., started a question, whether, as the case amounted undoubtedly to a great misdemeanor, they could not give

judgment as for a trespass: and the counsel for the Crown, in support of the power of the Court to do so, cited 2 Hawk. P. C. 440, and Cro. Jac. 497. Martin Leeser's case, 1 And. 351. Kel. 29, Dalt. 331. *E contra*, it was insisted that by this means a defendant would be deprived of many advantages; for if he was indicted properly, he might have counsel, a copy of his indictment, and a special jury. The Court ordered the prisoner to be discharged; and said, that in the cases cited *pro Rege*, the judges appear to have been transported with zeal too far. *Rex v. Westbeer*, 2 Stra. 1133. S. C. 1 Leach, 12. Prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him (which is felony by 24 & 25 Vict. c. 96, s. 42). The jury found them guilty of an assault, but negatived the intent charged. Held, that the prisoners could not, upon this indictment, and finding, be convicted of a common assault. *R. v. Woodhall*, 12 Cox, C. C. 240. Benman, J.

(w) 2 Campb. 585.

(x) The same distinction applies to the averments in the indictment. If an offence sufficient to maintain the indictment be well laid, it is enough, though other matters which would increase the offence are ill averred.

(y) Case of Swan and Jefferys, Fost. 104. 1 Phill. Ev. 501.

(z) Mackalley's case, 9 Rep. 67 b. Co. Litt. 232 a. Gilb. Ev. 233.

ing were not in the night, or on a charge of robbery, where the property was not taken from the person by violence, or by putting in fear—the prisoner may be found guilty of the simple larceny only. (a)

On an indictment for stealing in a dwelling-house, persons being therein, and put in fear, the prisoner may be convicted of simple larceny. (b) And in all complicated larcenies the prisoner may be acquitted of the circumstances of aggravation, as the fear or violence, and found guilty of the simple larceny. (c) So upon an indictment for horse-stealing, which is bad for not describing the animal by any term used in the statute, there may be a conviction for simple larceny. (d) So if a man had been indicted upon the statute of 1 Jac. of stabbing *contra formam statuti*, the jury might acquit him upon the statute, and find him guilty of manslaughter at common law. (e) And if a man had been indicted of stealing of goods of the value of ten shillings, the jury might find him guilty only of goods to the value of sixpence, and so guilty only of petit larceny. (f) But in order to convict of any offence which is not the offence primarily charged in the indictment, it is necessary that the minor offence should be substantially charged in the indictment. Thus where an indictment alleged that the prisoners feloniously made an assault on the prosecutor, and feloniously and violently did 'rob, steal, take, and carry away from his person certain money and goods,' and the jury found that the prisoners assaulted the prosecutor with intent to rob him, it was held that the conviction could not be sustained, because the indictment contained no statement of an intent to rob. (g)

The minor offence must be charged in the indictment.

Upon an indictment under 24 & 25 Vict. c. 100, s. 20, for unlawfully and maliciously wounding or inflicting greivous bodily harm, a verdict for a common assault may be returned. (gg)

If an indictment for treason charge several overt acts, it is sufficient to prove one. (h) If the indictment charges, that the defendant did, and caused to be done, a particular act, as 'forged, and caused to be forged,' it is enough to prove either one or the other. (i) If the defendant is charged with composing, printing, and publishing a libel, he may be convicted only of the printing and publishing. (j) So where the prisoner was indicted for having published a libel of and concerning certain magis-

Instances of divisible averments.

(a) 2 Hale, P. C. 302. 1 Phill. Ev. 501. So where the prisoners were acquitted of the burglary, upon an indictment for a burglary and larceny, and found guilty of stealing in the dwelling-house to the amount of forty shillings, it was holden that they were excluded from their clergy, though there was no separate and distinct count in the indictment on the 12 Anne, c. 7, and the judges were of opinion that the indictment contained every charge that was necessary in an indictment upon that statute. Vol. 2, p. 49. Rex v. Withal, 1 Leach, 88.

(b) Rex v. Etherington, 2 Leach, 671. S. C. 2 East, P. C. 635, vol. 2, p. 63.

(c) 2 East, P. C. 784.

(d) Rex v. Beaney, R. & R. 416.

(e) 2 Hale, P. C. 302.

(f) Ibid.

(g) Reg. v. Reid, 2 Den. C. C. 88. The 24 & 25 Vict. c. 96, s. 41, vol. 2, p. 78, now authorizes a conviction of an assault with intent to rob in such a case.

(gg) R. v. Taylor, 11 Cox, C. C. 261, *et per* Kelly, C. B., although the word assault does not occur in either count of the indictment, yet both counts necessarily include an assault, and both are counts for misdemeanor, and the prisoner having been found guilty of a common assault, we are of opinion that the conviction should be affirmed.

(h) Fost. 194.

(i) By Lord Mansfield in Rex v. Midlehurst, 1 Burr. 400.

(j) Rex v. Hunt, 2 Campb. 583. Rex v. Williams, *ibid* 646.

trates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley, J., informed the jury, that if they were of opinion that the defendants had published the libel with either of those intentions, they ought to find the prisoner guilty. (*k*) Where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her; and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention charged carnally to know her; Holroyd, J., held that the averment of intention was divisible, and that the prisoner might be convicted of an assault with intent to abuse simply. (*l*) On an indictment on the 7 Geo. 3, c. 50, s. 1 (now repealed), stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either was held sufficient. (*m*) And in the same case, the letter embezzled having been described in the indictment as having contained several notes, proof of its having contained any one of them was held sufficient. (*n*) Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged; proof of part, is sufficient. (*o*) So an indictment for embezzling need not specify the exact sum embezzled; as where the indictment charged the prisoner with embezzling, among other things, notes for one pound each, and evidence was given that there were one pound notes in the sum of money embezzled; this was held to support the indictment. (*p*) Where an information for publishing a malicious and seditious libel contained an averment that outrages had been committed *in and in the neighbourhood* of Nottingham; it was held that such averment was divisible, and that it need not be proved that they had been committed in both places. (*q*) But if it be necessary to state a prescription in an indictment, such prescription must be proved to the whole extent laid, otherwise the consequence might be, that the record would be evidence of a right which had been expressly disproved at the trial. (*r*)

Where the indictment charges several with a joint offence, any one of them alone may be found guilty. But they cannot be found guilty separately of separate parts of the charge, and if two be so found guilty separately a pardon must be obtained, or *nolle prosequi* entered, as to the one who stands second upon the verdict, before judgment can be given against the other. Thus where Hempstead and Hudson were indicted upon the statute of Anne for stealing in a dwelling-house to the value of 6*l.* 10*s.*, and the jury found Hempstead guilty as to part of the articles of the value of 6*l.*, and Hudson guilty as to the residue; the judges,

Joint offence  
charged  
against several,  
and one  
alone convicted.

(*k*) *Rex v. Evans*, 3 Stark. N. P. C. 35.

(*l*) *Rex v. Dawson*, 3 Stark. N. P. C. 62.

(*m*) *Rex v. Ellins, R. & R. C. C. R.* 188. Vol. 2, p. 425. And see *Shaw's case*, *ibid.* p. 508.

(*n*) *Ibid.*

(*o*) *Rex v. Hill, R. & R.* 190. Vol. 2, p. 598.

(*p*) *Carson's case, R. & R.* 303. So

on an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. Per Holt, C. J., *Rex v. Burdett*, Lord Raym. 149. See also *Rex v. Gillham*, 6 T. R. 265. *Serjeant v. Tilbury*, 16 East, 416. *Rex v. Hill*, 1 Stark. N. P. C. 369.

(*q*) *Rex v. Sutton*, 4 M. & S. 532.

(*r*) *Rex v. Marquis of Buckingham*, 4 Campb. 189.

upon a case reserved, held that judgment could not be given against both, but that upon a pardon or *nolle prosequi* as to Hudson it might be given against Hempstead. (s)

2dly. It is to be considered with what precision of proof those allegations, which cannot be disregarded in evidence, must be supported; or, in other words, what is a fatal variance between a material averment in an indictment and the evidence adduced in support of it. The general rule on this subject is, that a variance between the indictment and the evidence is not material, provided the substance of the matter be found. (t)

Upon this principle, where an indictment for the murder of a serjeant at mace of the City of London supposed that the sheriff of London, upon a plaint entered, made a precept to the serjeant at mace to arrest the defendant, and it appeared that there was not any such precept made, and that, by the custom of London, after the plaint entered, any serjeant *ex officio*, at the request of the plaintiff, might arrest a defendant, *absque aliquo precepto, ore tenus vel aliter*, it was holden that this statement of the precept was but circumstance, not necessary to be supported in evidence, and that it was sufficient if the substance of the matter were proved without any precise regard to circumstance. (u) In an indictment for perjury in an answer to a bill in chancery, the bill was stated to have been filed by A. against B. (the present defendant) and *another*; it appeared in evidence that it was filed against B., C., and D., but the perjury was assigned on a part of the answer, which was material between A. and B.; and Lord Ellenborough held this not to be a fatal variance. (v)

And with respect to the proof of the offence charged the rule is universal, that it is sufficient if the evidence agree in substance with the averments in the indictment. Thus on an indictment for murder, it will be sufficient if the manner of the death proved agree in substance with that which is charged. Therefore if it appear that the party was killed by a different weapon from that described, it will maintain the indictment, as if a wound or bruise alleged to have been given with a sword be proved to have been given with a staff or axe, or a wound or bruise alleged to have been given with a wooden staff be proved to have been given with a stone. So if the death be laid to have been by one sort of poisoning, and it turn out to have been by another, the difference will not be material. (w) But if a person be indicted for one species of killing, as by poisoning, he cannot be

2dly. With what precision of proof the allegations which cannot be disregarded must be supported, and herein of variance.

Rule that it will be sufficient to prove the substance of the issue.

Proof of offence charged.

(s) *Rex v. Hempstead*, R. & R. C. C. R. 344.

(t) 1 East, P. C. c. 5, s. 115, p. 345.

(u) *Rex v. Mackally*, 9 Co. 67 a.

(v) *Rex v. Benson*, 2 Campb. 508, S. P., by Abbott, C. J. *Rex v. Powell*, R. & M. N. P. C. 101.

(w) So where an indictment on the 43 Geo. 3, c. 58, s. 2, charged the prisoner with having administered to a woman a decoction of a certain shrub called *savin*; and it appeared that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub; the medical men who

were examined stated that such a preparation is called an *infusion*, and not a decoction (which is made by boiling the substance in the water); upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was mis-described. But Lawrence, J., overruled the objection, and said that infusion and decoction are *ejusdem generis*, and that the variance was immaterial; that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion. *Rex v. Phillips*, 3 Campb. 74.

convicted by evidence of a species of death entirely different, as by shooting, starving, or strangling. (x) So where upon an indictment for murder, which charged that the prisoner with a certain piece of brick, which he then and there held in his right hand, struck the deceased, thereby giving to him, with the piece of brick aforesaid, one mortal wound of which he died; and the jury found, not that the prisoner struck with the piece of brick, but that he struck with his fist, and that the deceased fell from the blow upon the piece of brick, and that the fall upon the brick was the cause of the death, the judges were unanimously of opinion that the means of death were not truly stated, and that the variance was fatal. (y) So where the indictment stated that the prisoner assaulted the deceased, and struck and beat him on the head, and then and there gave him divers mortal blows and bruises of which he died; and the evidence was that the prisoner knocked the deceased down by a blow on the head, and that in falling down upon the ground he received the injury which caused his death; the judges, on a case reserved, held that, the cause of death not being truly stated, the prisoner could not be convicted. (z) If the indictment charges that A. gave the mortal blow, and that B. and C. were present, aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. and C. were present, aiding, &c., this is not a material variance; for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had all together struck the deceased. The identity of the person supposed to have given the stroke, says Mr. J. Foster, is but a circumstance, and in this case a very immaterial one. (a)

Matters of  
inducement.

‘The cases which relate to the necessity of proving particular averments,’ said Mr. J. Chambre in the case of *Turner v. Eyles*, ‘only distinguish between that which is material and that which is impertinent, but make no distinction between that which is inducement, and that which is the immediate cause of action.’ Mr. Starkie, vol. 1, Ev. 450, note (l), observes that the distinction between the gist, and that which is the inducement, is not always clear. If by *inducement* such averments only be meant as are not material, but which, if struck out, would leave a valid charge behind, there is no question; but if the term include essential and material averments, then proof being necessary, *legal proof* is essential, and that must, it should seem, depend upon the nature of the allegation itself, and not upon its mere order or connection in point of time, or otherwise, with other material averments. On the other hand, it is certain that whenever an allegation is material and essential, whether it fall within the scope of the term *inducement* or not, or whatever its connection may be in the order of time, or otherwise, with the other essential averments, it must be proved according to the precise and particular, though superfluous, description with which it is encumbered.

(x) 1 East, P. C. c. 5, s. 107, p. 341,  
2 Hale, 185.

(y) *Rex v. Kelly*, R. & M. C. C. R.  
113.

(z) *Rex v. Thompson*, R. & M. C. C. R.

139.

(a) *Rex v. Mackally*, 9 Rep. 67 b. Fost.  
351. *Smith v. Taylor*, 3 B. & P. 463.  
*Gwinnet v. Phillip*, 1 N. R. 210.



But any difference in substance between the statements in the indictment and the evidence, as to the offence charged, will be fatal. Where on an indictment under Lord Ellenborough's Act, the prisoner was charged with *cutting* I. S., and the evidence was that the wounds were inflicted by *stabbing* and not by cutting, the judges held that as the statute used the alternative '*stab or cut*,' the variance was fatal. (b) If, on an indictment for perjury, the oath is stated to have been taken at the assizes, before justices assigned to take the said assizes, it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery. (c) In an indictment on the 43 Geo. 3, c. 56, the intent laid was to murder, to disable, or to do some grievous bodily harm; the intent found by the jury was to prevent being apprehended; it was held by the judges, on a case reserved, that a conviction could not be supported. (d)

Instances of fatal variances.

The name of any party whose existence is essential to the charge must be proved in conformity to that laid in the indictment, (e) for a misnomer of him is usually fatal. (f) And if such person be described as a certain person to the jurors unknown, and it appear in evidence that his name clearly was known, the prisoner cannot be convicted. (g) Where a prisoner is described by name simply, without addition, proof that there are two persons of that name is no variance, for the allegation is still true. Upon an indictment for an assault upon Elizabeth Edwards it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter; but the conviction was held to be good. (h) So where an indictment laid the property of a horse in Joshua Jennings, it was held to be

Misnomer of party whose existence is essential to the charge.

(b) *Rex v. M'Dermot*, R. & R. C. C. R. 356. *R. v. Plestow*, 1 Campb. 494, Cork's case, 1 Leach, 105.

(c) *Rex v. Lincoln*, R. & R. 421. But in an indictment for perjury alleged to have been committed on the trial of a cause before one of the judges of the King's Bench, without a *prout patet per recordum*, it is no variance that the *postea* alleges the trial to have taken place before the Lord Chief Justice, the cause having, in fact, been tried before the judge specified. *Rex v. Coppard*, M. & M. 118, Lord Tenterden, C. J. So where the indictment alleged that the cause came on to be tried before E. W., one of the judges, &c., and it was stated in the nisi prius record in the usual form that the cause was tried before the two judges of assize, one of whom was E. W., it was held no variance. *Rex v. Alford*, 14 East, R. 218.

(d) *Rex v. Duffin*, R. & R. 365.

(e) *Reg. v. Dent*, 2 Cox, C. C. 354, where there was no proof of any Christian name. *Earl of Cardigan's case*, cited Dears. C. C. 477.

(f) 1 Stark. Ev. 470. See *ante*, p. 393, as to the misnomer of the person stated to be the owner of the dwelling-house, in burglary, and on an indictment under the Black Act. On an indictment for stealing

in a dwelling-house to the value of 5*l.*, the name of the owner of the house must be proved as laid, vol. 2, p. 67. So on an indictment for robbing a dwelling-house in the day-time, some person being therein, the name of some person who was in the house at the time must be correctly stated. *Rex v. Kelly*, Carr. Suppl. 42. As to misnomer of a defendant, see vol. 1, p. 37.

(g) 1 East, P. C. 651. *Rex v. Robinson*, Holt, N. P. C. 595. *Rex v. Walker*, 3 Campb. 264. *Rex v. Deakin and Smith*, 2 Leach, 863. But if the charge against an accessory is that the principal felony was committed by *persons unknown*, it is no objection that the same grand jury have found a true bill imputing the principal felony to I. S. *Rex v. Bush*, R. & R. 372. See vol. 2, p. 481.

(h) *Rex v. Peace*, 3 B. & A. 579. The Court said, 'The question here is, not whether the party has been rightly described, but who the party is who is described in the indictment as having been assaulted.' But, generally, if the father and son be both named A. B., by A. B. simply the father shall be intended, *Wilson v. Stubs*, Hob. 330. *Lepiot v. Browne*, 1 Salk. 7. *Sweeting v. Fowler*, 1 Stark. 827. *By Williams v. Spicer*, 8 C. B.

Name  
assumed.

By which a  
person is  
generally  
known.

supported by proof of property in Joshua Jennings the younger. (*i*) So where an indictment for perjury alleged a suit to have been between Peacock and R. Miles, and the proceedings stated the suit to have been between Peacock and R. Miles the elder, it was held no variance. (*j*) So where an indictment for perjury alleged that there was a plaint, in which William Withers, the younger, was plaintiff, and the plaint was merely 'William Withers, plaintiff,' it was held that this was no variance. (*k*) The prosecutor may be described by the name he has assumed, though it is not his right name; thus where the goods stolen were laid to be the property of Mary Johnson, and the prosecutrix stated that her original name was Mary Davies, but that she had been called and known by the name of Mary Johnson, and not Mary Davies, for the last five years, and had not taken the name of Johnson for any purpose of concealment or of fraud; the judges, on a case reserved, were of opinion that the time the prosecutrix had been known by the name of Johnson warranted her being called so in the indictment. (*l*) And so a person is well described by the name by which he is generally known. Thus where a count for offering a bribe to an officer of the customs stated his name as Thomas Dabbs, and he proved that his true name was Thomas Tyrrel Dabbs, but that he generally went by the name of Thomas Dabbs, and signed his name Thomas Dabbs without Tyrrel, it was held that this was no variance. (*m*) So where an indictment for robbery laid the property in John Hancox, and it appeared that his name was John Walter Hancox, but that he was generally known by the name of John Hancox, Parke, J., held that this was sufficient. (*n*) So where in an indictment a boy was called Edward Dobson, and he stated that his right name was Dobson, but that most persons who knew him called him Peach, and that his mother had married two husbands, the first named Peach and the second Dobson, and that he was told by his mother that he was the son of the latter, and that she always used to call him Dobson; it was held that the evidence that the boy's mother had always called

(*i*) Hodgson's case, 1 Lewin, 236, Parke, J. S. P., Bland's case, *ibid.* Bolland, B.

(*j*) Rex v. Bailey, 7 C. & P. 264, Williams, J., who cited a MS. case where it was alleged that there was an indictment against A. B. and C. D., at a former time, and on the record being produced it appeared that it was an indictment against A. B. and C. D., the younger, and Lawrence, J., held it a fatal variance; on which it was observed that that must have been on the ground that if a person was named simply it meant the elder.

(*k*) Reg. v. Withers, 4 Cox, C. C. 17. Rolfe, B.

(*l*) Rex v. Norton, R. & R. 510.

(*m*) Attorney-General v. Hawkes, 1 Tyrw. 3, and per Alexander, C. B., 'By the aid of an averment of the identity of Thomas Dabbs and Thomas Tyrrel Dabbs, the defendant might plead an acquittal on this information, by way of *autrefois acquit*, to another information for offering a bribe to Thomas Tyrrel Dabbs on this

occasion.'

(*n*) Rex v. Berriman, 5 C. & P. 601. See Rex v. Sheen, 2 C. & P. 634. And see Rex v. —, 6 C. & P. 408, where an indictment for stealing a whip, the property of Richard Pratt, was held to be sustained by evidence that the prosecutor was generally known by that name, although his proper name was Richard Jeremiah Pratt. And see Williams v. Bryant, 5 M. & W. 447, where the defendant executed a bond in the name of William Bryant, being known at that time by that name, his real name being William Francis Bryant, and the Court held that the proof was sufficient upon the plea of *non est factum*. In Reg. v. Lippiatt, 1 Cox, C. C. 56, the indictment charged an assault on Sarah Bath, who had been christened Sarah Anne Bath, but had been known in the family by the name of Sarah only; and Coleridge, J., is reported to have held this a fatal variance. *See quare*.

him Dobson must be taken to be conclusive as to his name, and that, therefore, he was rightly described in the indictment. (o)

On an indictment for administering poison to Patrick Henry Smith, who had been christened by those names, but had been sometimes called Henry and sometimes Patrick, and never Patrick Henry, except by his mother, and had been confirmed eighteen years before by the name of Héñry, and had generally been called Henry afterwards, and had signed the name of Henry when he was married; Maule, J., said, 'It appears to me that the prosecutor is misdescribed; he has been commonly known by the name of Henry and of Patrick, but not of Patrick Henry. Then, again, although that is his name by baptism, he has since been confirmed by another, and in *Sir F. Gawdy's case* (p) it is laid down that where a man is confirmed by a different name from his baptismal one, he must be described by the name of confirmation. My brother Coleridge agrees with me that the prisoner must be acquitted.' (q) And where on the indictment of Frances Clark for the murder of 'George Lakeman Clark, a base-born infant male child,' it appeared in evidence that the deceased child was a bastard son of the prisoner, and that she murdered it, as charged in the indictment, but that the child was christened George Lakeman, being the names of its reputed father, and that it was called George Lakeman, and not by any other name known to the witnesses, and that the prisoner called it George Lakeman; the judges held that as the child had not obtained his mother's name by reputation, he was improperly called Clark in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction could not be supported. (r) And so where an illegitimate child, three weeks old, had been baptized by the name of 'Eliza,' but no surname was mentioned at the time of baptism, and neither the register, nor any copy of it, was produced at the trial, and an indictment for murder described her as 'Eliza Waters,' Waters being the name of her mother; it was held, upon a case reserved, that the child had not acquired the name of Waters by reputation, and that the conviction was wrong. (s) Where, however, an indictment charged the murder of Emma Evans, and it appeared that the deceased was an illegitimate child born in a workhouse, and baptized on the 9th of September by the name of Emma, and drowned on the 11th of the same month, when about six weeks old, and that up to the time of the baptism she was not called by any name, but that from the ninth to the 11th of September she was called Emma Evans, Evans being the mother's name; it was held that there was sufficient evidence of reputation for the consideration of the jury, and that this case was distinguishable from the last, because there was no evidence there that the child was ever called Waters at all. (t) And where, on an indictment for the murder of 'a certain female child whose name to the jurors was unknown,' it appeared that the child had not been baptized, but

Name  
changed at  
confirmation.

Of bastards.

Waters' case.

Evans' case.  
Name by  
reputation.

Smith's case.

(o) *Rex v. Williams*, 7 C. & P. 298, Williams, J., after consulting Alderson, B.

(p) Co. Litt. 3 a.

(q) *Reg. v. Smith*, 1 Cox, C. C. 248.

But quære whether the authorities show more than that the name of confirmation

is a good name.

(r) *Rex v. Clark*, R. & R. 358.

(s) *Rex v. Waters*, R. & M. C. C. R. 457, S. C. 7 C. & P. 250.

(t) *Reg. v. Evans*, 8 C. & P. 765, Esling, J., after consulting Patteson, J.

the prisoner had said she should like it to be called 'Mary Ann,' and had called it 'her Mary Ann' at one time, and 'Little Mary,' at another; the father was a baptist, and the child was a bastard, and twelve days old; and, upon a case reserved, it was held that the child had not gained a name by reputation, and therefore the indictment was right. (u) Where an indictment for larceny laid the goods stolen to be the property of *Victory Baroness Turkheim*, and the prosecutrix proved that Baroness Turkheim was her title only, and no part of her proper name, but that she was not only reputed to possess that title, but did actually possess it in right of an estate inherited from her father, and that she had constantly and uniformly acted in and been known by that appellation, but that her name without her title was Selina Victoria; the judges held the description sufficient. (v) So where an information for libel described the prosecutor as 'His Serene Highness Charles Frederick Augustus William Duke of Brunswick and Luneburg,' but his proper name was Charles Frederick William Augustus D'Este, and he had been formerly reigning Duke of Brunswick and Luneburg, and was still commonly called by that title, but he had in fact ceased to be reigning duke, the Court of Queen's Bench held the description sufficient, as it was that by which he was well known. (w)

Transposition  
of names.

A transposition of the order in which names are borne causes a variance. Thus it is a variance to describe Henry Jules Steiner as Jules Henry Steiner. (x)

*Idem sonans.*

But if the name proved be *idem sonans* with that in the indictment, and different in spelling only, the variance will be immaterial. Thus Segrave for Seagrave is no variance, (y) nor is Benedetto for Beniditto, (z) nor is McNicoll for McNicol. (a) So on an indictment for committing an offence on one John Whyneard it appeared that his name was spelt Winyard, but it was pronounced Winnyard; and the judges, on a case reserved, held that the prisoner had been rightly convicted. (b) But an indictment charging the prisoner with having personated 'Peter M'Cann' is not supported by evidence that he personated 'Peter M'Carn.' (c) So it has been decided that 'Shakespeare' cannot be considered *idem sonans* with 'Shakepear.' (d) Whether two names sound alike is a question for the jury, and not for the court. (e)

(u) *Rex v. Smith*, R. & M. C. C. R. 402, S. C., 6 C. & P. 151. See other cases on this subject, vol. 1, p. 792.

(v) *Sull's case*, 2 Leach, 861. An indictment for a robbery on an unmarried woman in her maiden name is good, although she marry before the indictment is found. *Rex v. Turner*, 1 Leach, 536.

Wherean indictment charged the prisoner with the manslaughter of Mark Robinson, and a witness stated that the deceased stayed three days and nights at his inn, and that he asked the deceased his name, and that letters came directed in that name, which letters were delivered to the deceased, and received by him; Patteson, J., held that the witness might be asked what name the deceased told him, as it was evidence to show the name by which he usually went. *Regina v. Microsoft*, P. 499.

(w) *Reg. v. Gregory*, 8 Q. B. 508. *Rex v. Sulls*, 2 Leach, 861, was considered by the court as decisive on the point. This report omits the name Augustus among the proper names, but the marginal note shows this was a mere mistake, and the names are all given in 2 Sess. C. 229.

(x) *Reg. v. James*, 2 Cox, C. C. 227. Pollock, C. B.

(y) *Williams v. Ogle*, 2 Stra. 889.

(z) *Abithol v. Beniditto*, 2 Taunt. 401.

*Reg. v. Withers*, 4 Cox, C. C. 17.

(a) *Reg. v. Wilson*, 1 Den. C. C. 284.

(b) *Rex v. Foster*, R. & R. 412.

(c) *Rex v. Tannet*, R. & R. 351.

(d) *Rex v. Shakespeare*, 10 East, 83. So Tarbart for Tabart is a fatal variance in a bail piece. *Bingham v. Dickie*, 5 Taunt. 14.

(e) *Reg. v. Davis*, 2 Den. C. C. 231.

Upon an indictment for robbing Thomas Bent, it was proved by a witness that he knew Lieutenant Bent, and saw him sign his name twice—once to the charge of the robbery, and once to the deposition in support of the charge, and from those signatures he knew his name to be Thomas Bent; but, except so far as he knew the fact from having seen Lieutenant Bent sign his name on those occasions, he knew nothing about his Christian name. So much only of the complaint and deposition as showed that they had been signed by Lieutenant Bent in the presence of the witness was then read; and, upon a case reserved, it was held that, although the evidence was open to observation to the jury, yet that there was no doubt that it was admissible as evidence of the Christian name of Lieutenant Bent. (*f*) So where an information for libel alleged that a certain person had murdered E. Grimwood, and the coroner proved that on the inquest on a female she was called by the witnesses E. Grimwood, and he produced an inquisition on paper purporting to be taken on the body of E. Grimwood, it was held that this was evidence that the deceased went by that name. (*g*)

Evidence of name.

As to amending the indictment at the trial to make it accord with the evidence, see vol. 1, p. 52.

Amending indictment at trial.

On the trial of indictments for offences which are not local in their nature, generally speaking, it will be sufficient to show that the offence was committed in some place within the county or other division; and a mistake of the place in which an offence is laid will not be material upon the evidence on the plea of not guilty, if the fact be proved at some other place in the same county. (*h*) Although the offence must be proved to have been committed in the county where the prisoner is tried, yet, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are properly admissible in evidence. (*i*)

Proof of place laid, where the offence is not local.

And it is no objection in the case of a transitory felony on the plea of not guilty that there is no such place or parish in the county as that in which the offence is stated to have been committed. (*j*)

Nor is it any defence on not guilty that there is no such parish.

Since the 14 & 15 Vict. c. 100, s. 23, it is not necessary to state any venue in the body of an indictment, unless a local description be required. (*k*)

To the above rule, as to the parish and place being immaterial, there are some exceptions; as, if the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish laid in the indictment. (*l*)

Exceptions as to proof of place laid.

But if the offence be in its nature local, and there be no such

Where the

In this case the indictment laid stolen property in Darius, C., and he said that his name was Trius, and the sessions held that the names were *idem sonantia*, as Darius (as pronounced in the Dorset dialect, D'rius) and Trius sounded alike; and it was held that it was a question of fact for the jury, and not of law for the court; and the judges could not affirm as matter of law that the two names sounded alike.

(*g*) Reg. v. Gregory, 8 Q. B. 508.(*h*) 2 Hawk. P. C. c. 25, s. 84.(*i*) 1 Phill. Ev. 206, 6th ed.

(*j*) Rex v. Woodward, MS. Bayley, J. 3 Burn J. D. & Wms. 384. S. C. R. & M. C. C. R. 323, vol. 2, p. 1054. Rex v. Perkins, 4 C. & P. 363, Park, J. A. J. Rex v. Dowling, R. & M. N. P. R. 433.

(*k*) See the section, *ante*, vol. 1, p. 24.(*l*) Archb. Cr. Pl. 43. See Rex v.(*f*) Reg. v. Toole, D. & B. 194. Digitized by Google

offence is local  
the parish  
must be proved  
as laid in the  
indictment.

place as that laid in the indictment, the prisoner must be acquitted of such local offence; if, however, the indictment contain a charge of a transitory offence, as larceny, the prisoner may be convicted of such transitory offence, although he is acquitted of the local offence. (m) So the offence of stealing in the dwelling-house to the value of five pounds is local, and, therefore, if the house be stated to be situate in a parish and county, it must be proved that the whole of such parish is in such county, and if it be not so proved the prisoner cannot be convicted of stealing in the dwelling-house to the value of five pounds, but he may be of the simple larceny. (n)

So on an indictment against a parish for not repairing a highway, on their common law liability to repair, the part of the road out of repair must be proved to be within the parish. (o) So it has been held that where an injury is partly local and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole, for the whole being one entire fact, the local description becomes descriptive of the transitory injury. (p)

Proof that the place or parish is usually and commonly known by the description used is sufficient. (q) And although there be two parishes of the general name, the general description will be sufficient (r)

Evidence that  
the name is  
usually known  
suffices.

Amendment.

But now, whenever any variance occurs between any local description and the evidence, the court may amend the record under the 14 & 15 Vict. c. 100, s. 1. (s)

Proof of time.

In criminal prosecutions it is unnecessary to prove the time of committing the offence precisely as laid, unless that particular time is material; and the facts may be proved to have occurred on any day previous to the finding of the bill by the grand jury. (t) And now, by the 14 & 15 Vict. c. 100, s. 24, no indictment is insufficient 'for omitting to state the time at which the offence was com-

(m) Reg. v. Brookes, C. & M. 543.

(n) Reg. v. Jackson, Gloucester Sp. Ass. 1842, MS. C. S. G., vol. 2, p. 46.

(o) Vol. 1, p. 495.

(p) 1 Stark. Ev. 466, citing Rex v. Cranage, 1 Salk. 385. In this case the indictment stated that the defendant with others riotously assembled, *et quoddam cubiculum cujusdam S. S., in domo mansionali cujusdam David James fregit et intravit*, and thirty yards of stuff took and carried away; it appeared to be the house of David Jameson; and Parker, C. J., held that this did not maintain the indictment, for part is local and part not local; the *cubiculum* is local, the taking and carrying away is not local; but then all is put together as one entire fact under one description, and you cannot divide them. So if there be an indictment for acting a play and speaking obscene words in such a parish, in a play-house in Lincoln's Inn Fields: if there be no play-house in Lincoln's Inn Fields the defendant must be acquitted; for though the words are not local, yet they are made so. One may make a trespass in the inn

so. If the speaking had been alleged in Lincoln's Inn Fields, then it had been laid as venue; but here it is otherwise, for here it is alleged as a description where the play-house stood. Per Parker, C. J., *ibid*.

(q) 1 Stark. Ev. 468. Kirtland v. Pounsett, 1 Taunt. 570. Goodtitle v. Walter, 4 Taunt. 671. Per Mansfield, C. J., in Vowles v. Miller, 3 Taunt. 140. Reg. v. St. John, 9 C. & P. 40.

(r) 1 Stark. Ev. 469, citing Doe d. James v. Harris, 5 M. & S. 326. Taylor v. Willans, 3 Bing. R. 449. Where an indictment stated that a highway alleged to be out of repair led to the parish of Langwm, in the county of Monmouth, and it appeared that there were two parishes in the county, Langwm Isha and Langwm Ucha, and that the highway led to the former; Bosanquet, J., held the description sufficient. Rex v. Lantrissent, Monmouth Sum. Ass. 1832. MSS. C. S. G.

(s) Vol. 1, p. 52.

(t) 1 Phil. Ev. 514. Rex v. Levy, 2 Stark. R. 458. Abbott, C. J.

mitted in any case where time is not of the essence of the offence, nor for stating the time imperfectly,' (*u*) and therefore it seems clear that the particular time need only be proved where time is of the essence of the offence. (*v*)

It is immaterial, in general, whether the value ascribed to property in the indictment be proved or not. By the 14 & 15 Vict. c. 100, s. 24, no indictment is insufficient 'for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value, or price, or the amount of damage, injury, or spoil is not of the essence of the offence;' (*w*) and, therefore, it seems clear that the value, price, or amount need only be proved where it is of the essence of the offence. Proof of value.

As to the old rule, that the want of a videlicet would in some cases make an averment material that would not otherwise be so; see 2 Saund. 291 *c.* in note (1) to Dakin's case. As a rule, the want of a videlicet will never do harm where, from the nature of the case, the precise sum, date, magnitude, or extent is immaterial. (*x*) Videlicet.

Where in an action for a libel contained in a pamphlet, a witness proved that the defendant had given her a pamphlet, and, on a copy being put in her hand, she said, 'This is my handwriting. I believe this to be the pamphlet; it was like it and in this form. I read different portions of it, and lent it to several persons; it was returned to me, and I then wrote this upon it. The defendant has given me different tracts at different times. I cannot swear that this is the same pamphlet he gave me. It is an exact copy, if it is not the same. It is the one I wrote upon. I cannot say I got back the same copy I lent. I only say it is exactly like it. If that is not the copy the defendant gave me, I do not know what has become of it;' it was held that there was some evidence to go to the jury that the copy was the same as the defendant had given to the witness. (*y*) Identity.

A question frequently arises in cases where the prisoner pleads that he has been previously acquitted, whether the acquittal has been of the same offence for which he is indicted. Thus where the prisoners, having been acquitted of a rape on Mary Lee, pleaded that acquittal to another indictment for a rape on Mary Lee at the Identity of offences.

(*u*) Nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened. See the section, vol. 1, p. 35.

(*v*) And a case might occur where time was of the essence of the offence, and yet it might not be essential to prove the precise time; as, for instance, if a statute made the doing of an act in certain months of the year an offence, it would suffice to prove that the act was done between such a day and such another day in those months, though the particular day could not be proved. See *Rex v. Chandler*, 1 Ld. Raym. 581, and *Reg. v. Simpson*, 10 Mod. R. 248, in note (*y*), *ante*, p. 96.

(*w*) See the section, vol. 1, p. 35. *Rex v. Forsyth*, Russ. & Ry. C. C. R. 274.

(*x*) 1 Stark. Ev. 454. *Rex v. Gillham*,

6 T. R. 265. 1 Phill. Ev. 213 *n.*, 7th ed.

(*y*) *Fryer v. Gathercole*, 4 Exch. R. 262. Alderson, B., said, 'If I give a shilling to a person to take up stairs and to put away, and he hands me one back as the same, it would be a question for the jury to say whether it is the same, and there is nothing unreasonable if they find that it is.' Alderson, B., also said, 'Suppose I pass my hand across my eyes for an instant, so as to lose sight of the coin for a moment, cannot I prove the identity?' Pollock, C. B., treated the question as one of degree. The evidence would be weaker or stronger in proportion as the numbers of the work were more or less, and the probability of the copy being the same would be greater or less according as there had been more or

same time and place as was alleged in the other indictment, and issue was taken on the identity of the rapes charged in the two indictments, the prisoners' counsel only put in the record of the previous acquittal, and the commitment of the magistrates for a rape on Mary Lee; and Bolland, B., told the jury that it did not appear to him that there was any evidence of the identity of the rapes charged in the two indictments. (z)

(z) *Rex v. Parry*, 7 C. & P. 836, S. C. *Rex v. Lea*, 2 M. C. C. R. 9. The jury, however, found a verdict for the prisoners, and it was held that this verdict could not be disturbed. Bolland, B., was strongly of opinion that the commitment was not admissible. In *Reg. v. Martin*, 8 A. & E. 481, Lord Denman, C. J., asked, 'Have you any authority for saying that identity is shown *prima facie* by collation of the

indictments? A defendant may have stolen the goods of the same party twenty times; and on *Rex v. Parry* being cited, Lord Denman, C. J., said, 'The point as to the sufficiency of the proof was not decided by the fourteen judges.' But there is no doubt that there was no evidence whatever of identity in that case. See vol. 1, p. 84.



## CHAPTER THE THIRD.

## OF WRITTEN EVIDENCE.

*Of the Proof and Effect of*—1. *Public Documents*, p. 407.—2. *Private Documents*, p. 433.

1ST. Of the proof and effect of public documents.

Acts of Parliament are either public or private. The printed statute book is evidence of a public statute. (a) A private Act of Parliament was usually proved formerly by a copy examined with the Parliament roll. (b) But now, by the 8 & 9 Vict. c. 113, s. 3, 'all copies of private, and local and personal Acts of Parliament not public Acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices and others, without any proof being given that such copies were so printed.'

Public documents.

Statutes.

By the 13 & 14 Vict. c. 21, s. 7, 'Every Act made after (A.D. 1850) shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act.' A private Act may contain clauses of a public nature, and then the Act, as far as those are concerned, is to be regarded as a public Act. Thus a clause relating to a public highway, occurring in a private Enclosure Act, has been holden provable in the same way as a public Act. (c) In some Acts of Parliament not relating to the kingdom at large, a special clause is often inserted declaring them to be public Acts, and that they shall be taken notice of as such, without being specially pleaded; in which case they are to be proved in the same manner as public Acts; it is not necessary to prove them by an examined copy, or to show that the printed copy was printed by the Queen's printer. (d) The clause referred to was intended for the facility of proof; it will not give the Act the effect of a public Act for other purposes, as with regard to the recital of facts contained in it. (e) A clause was often formerly inserted in private Acts, providing that they shall be printed by the King's printer, and that a copy so printed shall be admitted as evidence of the Act. In such cases, a copy, purporting to be printed by the King's printer, will be admissible in evidence: it is not necessary to prove that the Act was purchased at the King's printer. (f) By the 41 Geo. 3,

(a) Gilb. Ev. 10. 2 Phil. Ev. 127, 1 Stark. Ev. 274.

(b) Bull. N. P. 225.

(c) Rex v. Utterby, 2 Phill. Ev. 128, per Holroyd, J. And see Hob. 227.

(d) 2 Phill. Ev. 128, citing Beaumont v. Mountain, 10 Bingh. R. 404. 4 M. & Sc. 177. Woodward v. Cotton, 1 C. M. & R. 44. 4 Tyrw. 689.

(e) 2 Phill. Ev. 129, citing Brett v. Beales, M. & M. 421.

(f) 2 Phill. Ev. 129, Lincoln Sum. Ass. 1832, by Park, J. A. J. R. v. Wallace, 10 Cox, C. C. 500. Where the copy of an Act is incorrect, the court will be governed by the Parliament roll. Rex v. Jeffries, 1 Str. 446. Spring v. Eve, 2 Mod. 240.

c. 90, s. 9, copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorized, shall be received as conclusive evidence of the several statutes in the courts of either kingdom.

Preamble  
proof of facts  
recited.

The preamble of a public Act of Parliament, reciting that certain outrages had been committed in particular parts of the kingdom, was adjudged by the Court of King's Bench to be admissible in evidence, for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. (*g*)

Journals of the  
Houses of  
Parliament.

The journals of the House of Lords or of the House of Commons are evidence in criminal cases as well as in civil, and may be proved by examined copies; but the printed journals were not formerly evidence. (*h*) But now, by the 8 & 9 Vict. c. 113, s. 3, noticed *ante*, p. 407, 'copies of the journals of either House of Parliament, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof, without any proof being given that such copies were so printed.'

Gazette.

The public Acts of Government, and Acts by the King in his political capacity, are commonly announced in the Gazette, published by the authority of the Crown; and of such Acts announced to the public in the Gazette, the Gazette is admitted in courts of justice to be good evidence. (*i*) A proclamation for reprisals, published in the Gazette, is evidence of an existing war. (*j*) Proclamations for a public peace, or for the performance of a quarantine, and any acts done by or to the King in his regal character, may be proved in this manner, or by printed copies under the 8 & 9 Vict. c. 113, s. 3; (*k*) and, upon the same principle, articles of war, purporting to be printed by the King's printer, are allowed to be evidence of such articles. (*l*) A gazette, in which it was stated that certain addresses had been presented to the King, has been adjudged to be proper evidence to prove an averment of that fact in an information for a libel; (*m*) for they are addresses, said Lord Kenyon, C. J., of different bodies of the King's subjects, received by the King in his public capacity, and they thus become acts of state. And in *Rex v. Forsyth*, (*n*) the twelve judges seemed to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from. In *Rex v. Sutton* (*o*) the Court of King's Bench determined that the King's proclamation (which recited that it had been represented that certain outrages had been committed in

(*g*) *Rex v. Sutton*, 4 M. & S. 532.

(*h*) Lord Melville's case, 24 How. St. Tr. 683. *Chubb v. Solomons*, 3 C. & K. 75. *Jones v. Randall*, Cowp. 17. But a resolution of either House is not evidence of the truth of the facts there affirmed; and therefore, in the case of Titus Oates, who was charged with having committed perjury on the trial of persons suspected of the Popish Plot, a resolution in the journals of the House of Commons, asserting the existence of the plot, was not allowed to be evidence of that fact. 4 St. Tr. 39, 1 Phill. Ev. 406, 7th ed.; but see 2 Phill. Ev. 106.

(*i*) 2 Phill. Ev. 107, 108. 1 Stark. Ev. 279.

(*j*) *Ibid*.

(*k*) See this clause, *ante*, p. 407. See also the Documentary Evidence Act, 1868, *post*, p. 409.

(*l*) 2 Phill. Ev. 108, 109. See the 27 & 28 Vict. c. 119, as to the articles of war for the Navy.

(*m*) *Rex v. Holt*, 5 T. R. 436. S. C. 2 Leach, 593.

(*n*) R. & R. 274. *R. v. Wallace*, 10 Cox, C. C. 500. *Ante*, vol. 2, p. 461. See 31 & 32 Vict. c. 37, *post*, p. 409.

(*o*) 4 M. & S. 532.

different parts of certain counties, and offered a reward for the discovery and apprehension of offenders) was admissible in evidence, as proof of an introductory averment in an information for a libel, that acts of outrage of that particular description had been committed in those parts of the country.

The 31 & 32 Vict. c. 37, after reciting that it is expedient to amend the law relating to Evidence enacted as follows:—

Sec. 1. This Act may be cited for all purposes as the Documentary Evidence Act, 1868.

Sec. 2. *Primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned, that is to say: (1). By the production of a copy of the Gazette, purporting to contain such proclamation, order, or regulation. (2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the Legislature of such British colony or possession. (3) By the production, in the case of any proclamation, order, or regulation, issued by Her Majesty or by the Privy Council, of a copy or extract, purporting to be certified to be true by the Clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and in the case of any proclamation, order, or regulation issued by or under the authority of any of said department or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such departments or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

Sec. 3. Subject to any law that may be from time to time made by the Legislature of any British colony or possession, this Act shall be in force in every such colony and possession.

Sec. 4. If any person commits any of the offences following, that is to say: (1) Prints any copy of any proclamation, order, or regulation which falsely purports to have been printed by the government printer, or to be printed under the authority of the Legislature of any British colony or possession, or tenders in evidence any copy of any proclamation, order, or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or, (2) Forges, or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorized to be annexed to a copy of or extract from any proclamation, order, or regulation, he shall be guilty of felony, and shall, on conviction, be liable to be sentenced to penal servitude for such term as is prescribed by the Penal Servitude Act, 1864, as the least term to

Recital in proclamation proof of facts recited.

Documentary Evidence Act, 1868.

Proof of certain proclamations, orders, and regulations.

Punishment of forgery.

which an offender can be sentenced to penal servitude, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Interpretation  
clause.

Sec. 5. The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction (that is to say): "British Colony and Possession" shall for the purposes of this Act include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty by virtue of any Act of Parliament for the government of India, and all other Her Majesty's dominions. "Legislature" shall signify any authority other than the Imperial Parliament or Her Majesty in Council competent to make laws for any colony or possession. "Privy Council" shall include Her Majesty in Council and the Lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the schedule hereto. "Government Printer" shall mean and include the printer to Her Majesty, and any printer purporting to be the printer authorized to print the statutes, ordinances, Acts of State, or other public Acts of the Legislature of any British colony, or possession, or otherwise, to be the Government printer of such colony or possession. "Gazette" shall include the London Gazette, the Edinburgh Gazette, and the Dublin Gazette, or any of such gazettes.

Act to be  
cumulative.

Sec. 6. The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute, or existing at common law.

### SCHEDULE. (oo)

COLUMN 1. <i>Name of Department or Officer.</i>	COLUMN 2. <i>Names of Certifying Officers.</i>
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under Secretary of State.
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board or any Secretary or Assistant Secretary of the said Board.

(oo) By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 83, the Documentary Evidence Act, 1868, shall apply to the Education Department in like manner as if the Education Department were mentioned in the first column of the schedule to that Act, and any member of the Education Department, or any secretary or assistant secretary of the Education Department, were mentioned in the second column of that schedule.

By the Post-office Act, 1870 (33 & 34 Vict. c. 79), s. 21, the Documentary

Evidence Act, 1868, shall have effect as if the Postmaster-General were mentioned in the first column, and any secretary or assistant secretary of the post-office were mentioned in the second column of the schedule to that Act; and any approval of the Treasury under this Act shall be deemed an order within that Act.

See 33 & 34 Vict. c. 14 (the Naturalization Act, 1870), s. 12; 34 & 35 Vict. c. 70 (the Local Government Board Act, 1871), s. 5; 36 & 37 Vict. c. 71 (the Salmon Fishery Act, 1873), s. 64.

By the 8 & 9 Vict. c. 113, s. 1, 'whenever by any Act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.'

Certain documents to be received in evidence without proof of seal or signature, &c., of person signing the same.

Sec. 2. 'All courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers shall henceforth take judicial notice of the signature of any of the equity or common law judges of the Superior Courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.'

Courts, &c., to take judicial notice of signature of equity or common law judges, &c.

A certificate of a conviction made at the quarter sessions for a borough within the Municipal Corporations Act, purporting to be signed by a person described thereon as deputy clerk of the peace of the said borough, and having the custody of the records of the said quarter sessions, is admissible in evidence, under the 8 & 9 Vict. c. 113, s. 1, as purporting to be made by an officer having the custody of the records of the court where the conviction was made, within the 5 Geo. 4, c. 84, s. 24, although the Municipal Corporations Act (5 & 6 Will. 4, c. 76) gave no power to appoint a deputy clerk of the peace for a borough within that act. Per Bramwell, B., 'A person *de facto* filling an office, carrying with it the custody of the records of the court, may lawfully give such a certificate, although he may not hold such office *de jure*. (p)

By 23 & 24 Vict. c. 127, s. 22, any list of attorneys, solicitors, and conveyancers, purporting to be published by the authority of the Commissioners of Inland Revenue, and to contain the names of attorneys, solicitors, and conveyancers, who have obtained stamped certificates for the current year, on or before the first day of January in the same year, shall, until the contrary be made to appear, be evidence in all courts, and before all justices of the peace and others, that the persons named therein as attorneys, solicitors, or conveyancers, holding such certificates as aforesaid for the current year, are attorneys, solicitors, or conveyancers holding such certificates, and the absence of the name of any person from such list shall, until the contrary be made to appear, be evidence as aforesaid, that such person is not qualified to practise as an attorney, solicitor, or conveyancer under a certificate for the current year; but in the case of any person being an attorney or solicitor, whose name does not appear in such list, an extract from the roll

Law list evidence.

of attorneys and solicitors kept by the registrar, certified under the hand of the Secretary of the Incorporated Law Society (while such society performs the duties of registrar), or of the registrar for the time being, shall be evidence as aforesaid of the facts appearing in such extract, and in the case of any person, being a conveyancer, whose name does not appear in such list, the fact of his being so shall be proved in the way in which it is now by law required to be proved. (*q*)

Proofs under  
Extradition  
Act.

By the Extradition Act, 1870, 33 & 34 Vict. c. 52, s. 15, foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act, if authenticated in manner provided for the time being by law, or authenticated as follows :—

- (1). If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued.
- (2). If the depositions or statements, or the copies thereof, purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; and
- (3). If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place, and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents, as the case may be, are authenticated by the oath of some witness, or by being sealed with the official seal of the minister of justice, or some other minister of state. And all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof. (*r*)

By the Extradition Act, 1873, 36 & 37 Vict. c. 60, s. 4, it is declared that the provisions, of the principal Act (*rr*) relating to depositions and statements on oath taken in a foreign state, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign state, and copies of such affirmations.

Building So-  
cieties Act.—  
Proof of cer-  
tificates and  
rules.

By 37 & 38 Vict. c. 42 (The Building Societies Act, 1874,) s. 20, any certificate of incorporation or of registration, or other document relating to a society under this Act, purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received by the court and by all courts of law and equity, and elsewhere, without proof of the signature, and a printed copy of the rules of a society, certified by the secretary, or other officer of the society, to be a true copy of its registered rules, shall, in the absence of any evidence to the contrary, be received as evidence of the rules.

(*q*) *R. v. Wenham*, 10 Cox, C. C. Q. B. 217. *Ex parte Dubois*, 36 L. J. 222. M. C. 10.

(*r*) See *Ex parte Dubois*, 36 L. J. 222. The Extradition Act, 1870.

Records are proved either by producing the record itself, or by an exemplification, or by a copy. (s) As a general rule, when *nul tiel* record is pleaded, the record, if a record of the same court, is produced and inspected by the court; if a record of an inferior court, it is proved by the tenor of the record certified under a writ of *certiorari* issued by the Superior Court; if a record of a concurrent superior court, it is proved by the tenor certified under a writ of *certiorari*, issued out of chancery, and transmitted thence by writ of *mittimus*. (t) The issue of *nul tiel* record seldom occurs in criminal cases, except in the instance of a plea of *autrefois acquit*, &c. (u).

Proof of records.

On an issue of *nul tiel* record.

Wherever it was necessary to prove the finding or the trial of an indictment, the record must formerly have been regularly drawn up, and either produced, or an examined copy of it produced and proved. Where, therefore, an indictment for a conspiracy alleged that at a Court of Quarter Sessions an indictment was preferred against A. B., and found by the grand jury, the Court of King's Bench held that the indictment indorsed a true bill, but without any caption to it, and the minutes made by the clerk of the peace containing the style of the sessions, and the minutes of the business done at it, were not sufficient evidence of the finding of the bill, and that the record itself or an examined copy was the only legitimate evidence to prove it. (v) And so it has been held that a plea of *autrefois convict* cannot be supported by the indictment with the finding of the grand jury upon it. (w) So where the prisoner was in fact confined in Abingdon gaol, and the governor of that gaol proved that he was present in Court when the prisoner was tried for housebreaking, and heard sentence passed upon him, and he produced the calendar of the sentences passed at those assizes signed by the clerk of assize, and stated that there was not any other authority for carrying into execution the sentences of the Court at the assizes, even in cases of murder; Maule, J., held that this was not evidence of the prisoner being in lawful custody, as the sentence of the Court at the assizes could only be proved by the record. (x) Where on an indictment for the non-repair of certain highways, upon the trial of which the question was, whether a parish was bound to repair all the highways in it as a

Where it is necessary to prove indictments.

(s) 1 Stark. Ev. 388.

(t) Tidd. 801, 804. Rosc. Ev. 73. Before the 14 & 15 Vict. c. 99, s. 13, where a record of a court of quarter sessions was pleaded in a court of oyer and terminer, or the converse, it ought, in strictness, to have been proved as above stated; but the practice, it is said, was to apply simply to the clerk of the peace, or clerk of assize, who would make it out for you without writ, or would attend with the record itself at the trial. Arch. Cr. Pl. 124. See now the above Act, noticed, *post*, p. 415, which it seems applies in the cases mentioned in it, where there is an issue of *nul tiel* record.

(u) In which case it seems, the 14 & 15 Vict. c. 99, s. 13, *post*, 415, applies. Upon this plea, the proof of the issue lies on the defendant, and he will

have to prove the record of acquittal: and also, it has been said, the averments of identity in his plea. 1 Arch. Cr. Pl. 89. But this seems doubtful, for if the replication is *nul tiel* record, it should seem to admit the identity. See vol. 1, p. 38.

(v) Rex v. Smith, 8 B. & C. 341.

(w) Rex v. Bowman, 6 C. & P. 101. See the cases collected in note (g), vol. 1, p. 48, and Porter v. Cooper, 6 C. & P. 354, and Rex v. Thring, 5 C. & P. 507, where Gurney, B. held that the minute book of the Court of Quarter Sessions was not admissible in evidence on an indictment for perjury to prove the trial on which the perjury was alleged to have been committed; and Rex v. Bellamy, 8 B. & M. N. P. R. 471.

(x) Reg. v. Bourdon, 2 C. & K. 366.

parish, or the several townships the highways situate in each of them, in order to prove the conviction of the parish upon a similar indictment in 1806, a witness proved that he went to the house of the clerk of assize for the Oxford circuit, in London, and there saw him and his son, and asked for the record, and received a written paper, which he produced, which he and the son of the clerk of assize compared with a document then produced as the record, and which the witness stated he thought was on paper, but he was not sure whether it was on paper or parchment, but it was much torn, and the son of the clerk of assize stated that he could not recollect the particular transaction; but the practice was, when a record was required, to make it out from the minutes and the indictment on an original parchment roll, which was signed by the clerk of assize, and a copy was then made on paper and compared with the roll, and stamped with the Oxford circuit stamp, which copy was given to the party applying for it, and that, as far as his own experience went, the roll was drawn up from the indictment and minutes, without any paper draft in the first instance being made, and that he never knew of a paper-copy having been kept; and that the paper produced was signed by his father and stamped with the circuit stamp; Coleridge, J., held that the paper was admissible as an examined copy of the record. (y)

Minutes admissible during the same assizes.

The minutes of a Court of oyer and terminer may be received, where the matter to be proved by the minutes has occurred before the same Court sitting under the same commission; as upon the trial of Horne Tooke, where the minutes of the Court were received as proof of the trial of Hardy. (z) So the indictment with the officer's note upon it of a verdict of not guilty is sufficient evidence during the same assizes, upon a plea of *autrefois acquit*, that the prisoner was acquitted upon such indictment. (a) And so the caption of the general gaol delivery of the Central Criminal Court, the indictment with the note of the prisoner's plea, the verdict and the sentence entered thereon, together with the minutes of the trial entered by the officer of the Court in the minute book, are sufficient evidence at a subsequent session of the Central Criminal Court. (b)

Trials of appeals.

But although it was once held, on the trial of an indictment for perjury alleged to have been committed on the trial of an appeal against an order of removal, that the sessions book produced by the clerk of the peace was not sufficient to prove the trial of the appeal; (c) yet where on an appeal against an order of removal the book containing the proceedings at the sessions was proved to be the original sessions book, regularly made up and recorded after each sessions by the clerk of the peace, from minutes taken by him in Court, and the minutes of each sessions were headed by an

(y) Reg. v. The Inhabitants of Pembridge, C. & M. 157.

(z) 2 Phill. Ev. 135, citing 25 St. Tr. 446.

(a) Rex v. Parry, 7 C. & P. 836, Boland, B.

(b) Reg. v. Newman, 2 Den. C. C. 390; 21 L. J. M. C. 75, ante, p. 39.

(c) Rex v. Ward, 6 C. & P. 366, Park,

J. A. J. The clerk of the peace stated that he should have drawn up a record on parchment, if he had been applied to so to do, and the case does not state what the form of the entry in the book was. See the observations of the court on this case in Reg. v. Yeovely, 8 A. & E. 806, *infra*.



entry containing the style and date of the sessions, and the names of the justices in the usual form of a caption, and no other record was kept of the proceedings of the sessions than the said sessions book, and it had always been received in evidence in the Court of Quarter Sessions, for the purpose of proving them; the Court of Queen's Bench held, that such book was properly received in order to prove the quashing of an order of removal on the trial of a former appeal between the same parishes. (*d*)

When *nul tiel* record is not pleaded, but it is necessary to prove a record in support of some allegation in the pleadings, the record may be proved either by an exemplification or a copy. Exemplifications are either under the great seal or under the seal of the Court in which the record is produced, and are admissible without proof of the genuineness of the seal. (*e*) A record may also be proved by an examined copy, except upon the issue of *nul tiel* record. (*f*) The copy must be proved by some witness who has examined it line for line with the original, or who has examined the copy while another read the original. (*g*) It ought to appear that the record from which the copy was taken was seen in the hands of the proper officer, or in the proper place for the custody of such records. (*h*) So an office copy in the same Court in the same cause, is equivalent to a record; but in another court, or in another cause in the same Court, the copy must be proved. (*i*) In order to prove a verdict, a copy of the whole record, including the judgment, is necessary, for otherwise it would not appear but that the judgment had been arrested, or a new trial granted. (*j*) Where an indictment for perjury alleged that Burraston was convicted upon an indictment for perjury, upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record when produced that Burraston had been convicted, but the judgment against him reversed upon error after the finding of the present indictment, it was held that the record produced supported the allegation in the indictment. (*k*)

By the 14 & 15 Vict. c. 99, s. 13, 'whenever in any proceeding whatever (*l*) it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the Court or other officer having the custody of the records of the Court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced

In other cases-

Where necessary to prove conviction or acquittal of any person, the record may be certified under hand of clerk of court.

(*d*) Reg. v. Yeovely, 8 A. & E. 806, and see per Patteson, J., in Rex v. Nottingham Old Water Works Company, 6 A. & E. 355.

(*e*) Tooker v. Duke of Beaufort, Sayer, 297.

(*f*) Upon this issue the record in certain cases can be proved in the mode pointed out by the 14 & 15 Vict. c. 99, s. 13, *infra*.

(*g*) Reid v. Margison, 1 Campb. 469. It is not necessary for the persons examining to exchange papers, and read them alternately. Gyles v. Hill, *ibid.* *n.* As to the examination of the whole of the

rules of a benefit society enrolled at the office of the clerk of the peace, see Reg. v. Boynes, 1 C. & K. 65, *ante*, p. 94.

(*h*) Adamthwaite v. Synge, 1 Stark. 183. 4 Campb. 372. S. C.

(*i*) Rosc. Ev. 75. Burnand v. Nerot, 1 C. & P. 578.

(*j*) Bull. N. P. 234. But the *nisi prius* record, with the postea indorsed, is sufficient evidence that the cause came on to be tried. Pitton v. Walter, 1 Str. 162.

(*k*) Reg. v. Meek, 9 C. & P. 513, Williams v. Meek, 10 C. & P. 21.

(*l*) Richardson v. Wilks, 42 L. J. Ex. 15. L. E. 8 Ex. 69.

is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.' And see the 14 & 15 Vict. c. 100, s. 22. (*m*)

Proof of previ-  
ous conviction.

By 34 & 35 Vict. c. 112, s. 18, 'a previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the Court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same. A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom, and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof. A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section. The mode of proving a previous conviction authorized by this section shall be in addition to and not in exclusion of any other authorized mode of proving such conviction.'

The several statutes which afford facilities for proving a previous conviction by means of a certificate of the clerk of assize, or clerk of the peace, are made for the more easy proof of such convictions, and do not prevent the proof of the previous conviction by an examined copy of the record. (*r*)

Copies of re-  
cords in the  
Record Office.

By the 1 & 2 Vict. c. 94, ss. 12, 13, every copy of a record in the custody of the master of the rolls certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the record office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further

(*m*) *Ante*, p. 36, and see *ante*, p. 413.

(*r*) *Rex v. Henry Saunders*, Gloucester Spr. Ass. 1829, MSS. C. S. G. The prisoner was indicted under the 15 Geo. 2, c. 28, s. 2, for uttering base coin after a previous conviction, and Parke, J., held that an examined copy of the record of the previous conviction was sufficient

evidence thereof; for the statute, by giving an easier means of proof under sec. 9, did not exclude the proof by means of an examined copy. See also *Reg. v. Carter*, 1 Den. C. C. 65. *Northam v. Latouche*, 4 C. & P. 140. *Edwards v. Buchanau*, 3 B. & Ad. 788, *Reg. v. Shawaring*, D. & B. 132.

or other proof thereof, in every case in which the original record could have been received there in evidence.

Records properly produced in evidence are conclusive against those who are parties to them :—thus a record of conviction of a parish for not repairing a road, is for ever afterwards evidence of their liability to repair ; (*n*) but it not conclusive as against other parties, except as to the fact that the persons charged have been convicted ; (*o*) therefore an accessory may controvert the guilt of his principal, notwithstanding the record of his conviction, (*p*) and it seems that the record of the conviction of the principal is not admissible against the accessory in any case. (*q*)

Effect of records in evidence.

A writ may in general be proved by the production of it. But when it is treated as matter of record in the pleading it must be proved by a copy of the record after the writ has been returned. (*s*) An answer in chancery is proved by the production of the bill and answer, or of examined copies of them ; (*t*) but on proof by the proper officer that the bill has been searched for in the office, and not found, the answer may be read without the bill. (*u*) Depositions in a suit in chancery are not in general admissible without proof of the bill and answer. (*v*) The 12 & 13 Vict. c. 109, s. 11, enacts that a seal shall be provided for the High Court of Chancery, to be called the Chancery Common Law Seal, and that 'all courts, tribunals, judges, justices, officers, and other persons shall take notice of the said seal, and receive impressions thereof in evidence, in like manner as impressions of the Great Seal are received in evidence, and shall also take notice of and receive in evidence, without further proof, all and every of such writs, proceedings, instruments, documents, and writings which shall purport or appear to be sealed or stamped with the said Chancery Common Law Seal, in like manner as if the same had been sealed with the Great Seal.' And by sec. 13, every office copy issued from the Petty Bag Office shall be sealed with the said Common Law Seal, and every document sealed with such seal, and purporting to be a copy of any record or other document of any description, shall be deemed to be a true copy of such record or other document, and shall, without further proof, be received in evidence before either House of Parliament, and any committee thereof, and also by all courts, tribunals, judges, justices, officers, and other persons, in like manner and to the same extent

Proof of a writ.

Proceedings in chancery.

Documents sealed with the Chancery Common Law Seal.

(*n*) *Rex v. St. Pancras, Peake*, N. P. C. 219 ; see 2 Saund. 160, vol. 1, p. 501.

(*o*) See *Rex v. Shaw, R. & R.* 526, where upon an indictment for delivering instruments to a prisoner to facilitate his escape from gaol, it was held that the record of his conviction being produced by the proper officer, no evidence was admissible to dispute what it stated.

(*p*) *Rex v. Smith*, 1 Leach, 288.

(*q*) *Rex v. Turner, R. & M. C. C. R.* 347, vol. 1, p. 184. In *Keable v. Paine*, 8 A. & E. 555, Patteson, J., said, 'On an indictment for receiving goods feloniously taken, the felony must be proved, and neither a judgment against the felon, nor his admission, would be evidence against the receiver.'

(*s*) *Bull. Ni. Pri.* 234.

(*t*) 2 Phill. Ev. 139. The recital in the jurat of the place where the answer purports to be sworn, is sufficient proof that the oath was administered at that place. *Rex v. Spencer, R. & M. N. P. C.* 97.

(*u*) *Gilb. Ev.* 49. See as to the proof of the identity of the parties, *post*, p. 434. An answer offered in evidence merely as an admission of the party on oath, is sufficiently proved by an examined copy, without proof of a decree, or the party's handwriting. *Lady Dartmouth v. Roberts*, 16 East, 334. See also *Ewer v. Ambrose*, 4 B. & C. 25.

(*v*) *Bull. N. P.* 240. *Gilb. Ev.* 62. *See also* 2 Phill. Ev. 149.

Proceedings  
in the ecclesi-  
astical courts.

as the original record or other document would be received if tendered in evidence for the purpose of proving the contents of such record or other document. (*w*) The proceedings in the ecclesiastical courts are proved in the same way at common law as those in equity; and their sentences are received in the temporal courts as conclusive evidence of the fact adjudged, upon questions within their jurisdiction; but in a suit of jactitation of marriage a sentence against the marriage is not conclusive, as it decides not directly, but only collaterally, on the validity of the marriage. (*x*) By 20 & 21 Vict. c. 85, a court of record, called the Court for Divorce and Matrimonial Causes, was established. By sec. 13 of this Act the Lord Chancellor shall direct a seal to be made for the said court, and may direct the same to be broken, altered, and renewed at his discretion; and all decrees and orders, or copies of decrees or orders, of the said court, sealed with the said seal, shall be received in evidence.

Divorce Court.

Proof of a will.

When it is necessary to show a title to personality under a will, or that a particular person is executor, the will cannot be read in evidence, but the probate must be produced. (*y*) The seal of the ecclesiastical court on the probate proves itself. (*z*) Generally speaking, a probate unrepealed is conclusive evidence of the validity of the will; but on an indictment for forging a will, probate of that will unrepealed is not conclusive evidence of its validity, so as to be a bar to the prosecution. (*a*) To prove a probate revoked, an entry of the revocation in the book of the ecclesiastical court, called the 'assignment book,' in which all causes were officially entered, is good evidence. (*b*) Administration granted before the Probate Act, 20 & 21 Vict. c. 77, is proved by the production of the letters of administration, or a certificate or exemplification thereof, granted by the ecclesiastical court, (*c*) or by the original book of Acts, directing the grant of letters, or an examined copy of it. (*d*) By the 20 & 21 Vict. c. 77, the Court of Probate was established. By sec. 22 of that Act the judge shall cause to be made seals for the Court of Probate, that is to say, one seal to be used in its principal registry, and separate seals to be used in the several district registries, and may cause the same respectively from time to time to be broken, altered, and renewed at his discretion; and all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

Proof of ad-  
ministration.

Judgments  
of inferior  
courts.

Judgments in a court-baron, or other inferior court, may be proved by the production of the book containing the proceedings of the court from the proper custody, and if not made up in form, the minutes of the proceedings will be evidence, or an examined copy of such proceedings or minutes will be evidence. (*e*) But this rule

(*w*) See secs. 17, 18, and 19, as to the seal for the enrolment office, the certificates of enrolment, and sealed copies of enrolments being evidence.

(*x*) *Duchess of Kingston's case*, 11 St. Tr. 263. *Ante*, p. 267.

(*y*) *Rex v. Barnes*, 1 Stark. N. P. C. 243.

(*z*) *Kempton v. Cross*, Cas. Temp. Hardw. 108.

s. 22, *infra*.

(*a*) *Rex v. Buttery*, R. & R. 342.

(*b*) *Rex v. Ramsbottom*, 1 Leach, 25, in note to Rhodes's case.

(*c*) *Kempton v. Cross*, Cas. Temp. Hardw. 108.

(*d*) *Elden v. Keddel*, 8 East, 187. *Davis v. Williams*, 13 East, 232.

(*e*) *Rex v. Hains*, per Holt, Comb. 337. *Vin. Ab. Ev. A. b. 26*, p. 99. *Rosc.*

does not extend to proceedings of the Court of Quarter Sessions on the Crown side, which is a court of record. (f) By the County Courts Act, 9 & 10 Vict. c. 95, s. 111, it is enacted, that the clerk of every court holden under this Act shall cause a note of all plaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof (g)

The judgment of a foreign court was formerly generally proved by proving the authenticity of the seal affixed to the judgment. In the case of *Henry v. Adey*, where the plaintiff, who sued here on a judgment obtained in the Island of Grenada, was nonsuited, because he could not prove the seal affixed to be the seal of the island, the court said, they could not take official notice that the seal affixed was the seal of the island, which was necessary to be shown in order to prove the judgment, which it purported to authenticate; and that proving the judge's handwriting could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended. (h) If a colonial court possess a seal, it ought to be used for the purpose of authenticating its judgments. (i) If it is clearly proved that the court has not any seal, so that the document cannot be clothed with the form of a legal exemplification, it must be shown to possess some other requisite to entitle it to credit; as by proving the signature of the judge upon the judgment. (j) An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the court, is evidence of the judgment in the courts of this country: (k) but a document, purporting to be a copy of a judgment made by the officer of the court, is not admissible. (l)

Foreign judgment.

Ev. 80. As to its being necessary in proving the judgment of such a court to give evidence of the proceedings previous to the judgment, see Com. Dig. Ev. C. 1.

(f) *R. v. Smith*, 8 B. & C. 341.

(g) See *Dews v. Ryley*, 20 L. J. C. P. 264. *R. v. Rowland*, 1 F. & F. 72.

(h) 3 East, 221. 2 Phill. Ev. 143. See also *Buchanan v. Buckner*, 1 Campb. 63. *Flindt v. Atkins*, 3 Campb. 215, in a note. The 6 Geo. 4, c. 133, s. 7, enacting that the common seal of the society of apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate, to which such seal is affixed, did not make such certificate evidence without proof that the seal affixed is the genuine seal of the society. *Chadwick v. Bunning, R. & M.* N. P. C. 306. But the 14 & 15 Vict. c. 99, s. 8, makes the proof of the seal or of the authenticity of the certificate unnecessary. Where a sheriff's officer pro-

duced the warrant under which he had acted, which concluded 'given under the seal of my office,' and there was a small piece of paper wafered to it, and stamped with a wafer stamp; and the officer proved that he did not know this to be the seal of the sheriff or of his officer, but he had received the warrant from the person who had acted as under-sheriff, and it was precisely similar to all the other warrants under which he had acted; Parke, B., held that this was sufficient proof of the seal. *Bunbury v. Matthews*, 1 C. & K. 380.

(i) *Cavan v. Stewart*, 1 Stark. N. P. C. 525.

(j) *Alves v. Bunbery*, 4 Campb. 28. 2 Phill. Ev. 143.

(k) *Black v. Lord Braybrook*, 2 Stark. N. P. C. 11, 12.

(l) *Appleton v. Lord Braybrook*, 2 Stark. N. P. C. 6, 7. 6 M. & S. 34. 2 Phill. Ev. 143.

Foreign and colonial Acts of State, judgments, &c., provable by certified copies, without proof of seal or signature, or judicial character of person signing the same.

But now by the 14 & 15 Vict. c. 99, s. 7, 'all proclamations, treaties, and other Acts of State of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other Act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.'

By 28 & 29 Vict. c. 63, entitled 'An Act to remove doubts as to the Validity of Colonial Laws,' s. 6, 'the certificate of the clerk or other proper officer of a legislative body in any colony, (m) to the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any bill reserved for the signification of her Majesty's pleasure, by

(m) By sec. 1 the term "colony" shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature, as hereinafter defined, except the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty, under or by virtue of any Act of Parliament for the government of India. The terms "Legislature" and "Colonial Legislature" shall severally signify the authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony.

The term "Representative Legislature" shall signify any colonial legislature which shall comprise a legislative body, of which one-half are elected by

inhabitants of the colony.

The term "Colonial Law" shall include laws made for any colony either by such legislature as aforesaid, or by Her Majesty in Council:

An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament.

The term "Governor" shall mean the officer lawfully administering the government of any colony.

The term "Letters Patent" shall mean letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland.

the said governor, shall be *prima facie* evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill shall relate, and signifying her Majesty's disallowance of any such colonial law, or her Majesty's assent to any such reserved bill as aforesaid, shall be *prima facie* evidence of such disallowance or assent.

The law of a foreign state must be proved. (n) Where, to prove the law of France as to marriage, the French vice-consul produced a book, which he said contained the code of laws upon which he acted at his office; that it was printed at the office for the printing of the laws of France; and that it would have been acted upon in any of the French courts; it was ruled by Abbott, C. J., to be sufficient proof of the law. (o) The law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill. (p) And the proper course to prove the law of a foreign country is to call a witness expert in it, and to ask him, on his responsibility, what that law is, and not to read any fragments of a code. (q) So a person of experience in the profession of the law of another country may state his opinion what, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. Thus a gentleman at the Scotch bar has been allowed to state his opinion, whether a marriage, as proved by the witnesses, would be valid according to the Scotch law. (r) And where, on an indictment for bigamy, it was proved that the prisoner had been married to a soldier of the name of Dent, and afterwards to one Wall, and the defence was that Dent had been legally married in Scotland, previous to his marriage with the prisoner, and a witness proved that Dent being with his regiment in Scotland, the witness, Dent, a female, and several others, went to a house, to which they were directed after inquiring for the house of the clergyman of the place, where a gentleman performed a ceremony somewhat similar to the marriage service of the Church of England, between Dent and the female, and that they afterwards lived together as man and wife; Wightman, J., held that a gentleman, who had lived in Scotland until he was twenty, and who had frequently been there since, and who was possessed of very considerable literary attainments, and stated that he was well acquainted with the law of marriage in Scotland, although he was not a lawyer, was competent to prove that the marriage in question was a valid marriage according to that law. (s) But this case was expressly overruled in the *Sussex Peerage case*, (t) where it was held that the person, who proves a foreign law, must be

Proof of  
foreign laws.

Dent's case.

Sussex  
Peerage case.

(n) Clegg v. Levy, 3 Campb. 166.  
Roscoe, Ev. 82. Baron de Bode's case,  
post, p. 422.

(o) Lacon v. Higgins, 3 Stark. 178.  
(p) Per Gibbs, C. J., Miller v. Ken-  
rick, 4 Campb. 155.

(q) Cocks v. Purday, 2 C. & K. 259,  
Erle, J. The Sussex Peerage case, 11

Cl. & F. 85, *infra*.

(r) Rex v. Wakefield, Murray's ed.,  
p. 238.

(s) Reg. v. Dent, Monmouth Spring  
Ass. 1843, MSS. C. S. G. 1 C. & K.

(t) 11 Cl. & F. 85. See R. v. Savage,  
13 Cox, C. C. 178.

Baron de  
Bode's case.

*peritus virtute officii vel professionis*; and that though the witness may refresh his memory, or correct or confirm his opinion, by foreign law books, yet the law itself must be taken from his evidence. (u) Where, therefore, evidence having been given to show the state of the law of inheritance in Alsace at a particular time, a witness was called, who stated himself to be a French advocate practising at Strasbourg, in the department of Bas Rhin, and that the feudal law had been put an end to in Alsace by the torrent of the French revolution *de facto* in 1789, and by the treaty of Luneville *de jure*; and upon being asked whether there was not a decree to that effect, he added that there was such a decree of the 4th of August, 1789, of the national assembly, and that he had learned this in the course of his legal studies, it being part of the history of the law which he learned while studying the law; it was objected that this evidence could not be received, unless the decree itself were proved and put in; but the majority of the Court of Queen's Bench held that it might; for the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men, and is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. If an English court were to attempt to expound the written law of a foreign country, it would be liable to the most serious errors. The question is not what the language of the written law is, but what the law is altogether, as shown by exposition, interpretation, and adjudication. (v)

The know-  
ledge must be  
acquired by  
practice.

Where a witness was a German juriconsult, and had studied the German law at the University of Leipsic in Saxony, but had not transacted business at Cologne, and had no knowledge of the laws of Cologne but from books; Alderson, B., held that he could not give evidence of the law of Cologne, as he had not had any practice at Cologne. (w) But where a native of Belgium stated that he had formerly carried on the business of a merchant and commissioner in stocks and bills of exchange at Brussels, but was now an hotel keeper in London, and that he was well acquainted with the Belgian law upon the subject of bills and notes; it was held that he was competent to prove that by the law of Belgium it is not necessary, even though a bill or note is made payable at a particular place, that it should be presented there for payment; for inasmuch as he had been carrying on a business which made it his interest to take cognizance of the foreign law, he fell within the description of an expert. (x)

(u) In this case it was held that a Roman Catholic Bishop, holding the office of coadjutor to a vicar apostolic in this country, was, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and therefore competent to prove that law.

(v) Baron de Bode's case, 8 Q. B. 208, 246. Patteson, J., *dissentiente*.

(w) Bristow v. De Secqueville, 3 C. & K. 64; and this

by the full court. 5 Exch. R. 275. *In the goods of Bonelli*, 45 L. J. Prob. 42.

(x) *Vander Donckt v. Thellusson*, 8 C. B. 812. The competency of a witness to prove foreign law is a question for the court, and it seems, as a general rule, that in order to render a person competent he should have some peculiar means from his profession or business, of becoming acquainted with the law, with respect to which he is called on to speak.



A judgment obtained in one of the superior courts in Ireland, since the Union, is not a record in England. (y) But now by the 14 & 15 Vict. c. 99, s. 9, 'every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.'

Irish judgment.  
Documents admissible without proof of seal, &c., in England or Wales equally admissible in Ireland.

Sec. 10. 'Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.' (z)

Documents admissible without proof of seal, &c., in Ireland equally admissible in England or Wales.

By the 22 & 23 Vict. c. 63, in any judicial proceeding instituted in any court, civil, criminal, or ecclesiastical, within Her Majesty's dominions, if the court deem it necessary for the proper disposal of such proceeding to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions, the court in which the proceeding is pending may direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, &c., and the court shall settle the question of law arising out of the same, and remit the case to the superior court, whose opinion is desired in such other part of Her Majesty's dominions. The Act then prescribes the mode of obtaining the opinion of the court, and of remitting it to the court by which the opinion was required, which court is thereupon to apply such opinion to such facts in the same manner as if the same had been pronounced by such court itself upon a case reserved, or upon a special verdict; or the court may, if the opinion has been obtained before the trial, order it to be submitted to the jury with the other facts of the case as evidence, or conclusive evidence, of the foreign law therein stated.

Mode of ascertaining the law in different parts of the Queen's dominions.

The 24 & 25 Vict. c. 11, contains similar provisions for the purpose of enabling any superior court in Her Majesty's dominions to obtain the opinion of any court of any foreign state, with which Her Majesty may have made a convention for that purpose, as to the law of such state.

In foreign countries.

Vanderdoncht v. Thelluson, 8 C. B. 812, Cresswell, J. See Reg. v. Povey, 6 Cox, C. C. 83.

(z) By sec. 11, documents admissible without proof of seal, &c., in England, Wales, or Ireland, are equally admissible in the colonies.

(y) Harris v. Saunders, 4 B. & C. 411.

Convictions  
before justices  
of the peace.

Public books.

Registers of  
births, deaths,  
and marriages.

Convictions before justices of the peace are either produced in court, and the handwriting of the magistrates to them proved, (*a*) or they may be proved by examined copies, which the clerk of the peace of the proper county will make out, upon an application for that purpose, (*b*) or they may be proved in certain cases by copies or certificates under the provisions of sundry statutes. (*c*) But a conviction cannot be proved by the notes in the minute book of the justices before whom it took place, or by oral evidence. (*d*) In many instances, public books are admitted in evidence to prove the facts recorded in them. The muster-book in the navy office has been admitted in evidence to prove the death of a sailor; (*e*) the book from the master's office in the Court of King's Bench, to prove a person one of the attorneys of that court; (*f*) and the log-book of a man-of-war, which conveyed a fleet, to prove the time of the convoy's sailing. (*g*) Bank-books are good evidence to prove the transfer of stock; (*h*) and on a prosecution for a libel published concerning a person in his office of treasurer of a parish, an entry in a vestry-book, stating that he was elected at a vestry duly held in pursuance of notice, has been considered sufficient evidence to support an allegation in the indictment that he was duly elected treasurer. (*i*) The day-book of a public prison, containing a narrative of the transactions of the prison, has been received upon the same principle, as proof of the time of a prisoner's commitment or discharge; (*j*) but it would not be admissible to prove the cause of his commitment. (*k*) So on an indictment for forging a seaman's will, an entry in a book called the assignation-book, in which all causes are officially entered, was admitted to prove the probate revoked. (*l*) The registers of christenings, marriages, and burials, preserved in churches, are good evidence; (*m*) and in order to prove the register of a marriage, it is not necessary to call the attesting witnesses; but as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers may be called to prove that they rung the bells, and came immediately after the marriage, and were paid by the parties; or the handwriting of the parties may be proved, even where the register is not produced; (*n*) or persons may be called who were present at the wedding dinner, &c. (*o*) Registers

(*a*) *Massey v. Johnson*, 12 East, 67.  
*Gray v. Cookson*, 16 East, 13. *Mason v. Barker*, Gloucester Spr. Ass. 1843, Erskine, J. MSS. C. S. G.

(*b*) Arch. Cr. P. 213.

(*c*) See 24 & 25 Vict. c. 96, ss. 112, 116, 24 & 25 Vict. c. 97, s. 70, and the 24 & 25 Vict. c. 96, s. 110, and 24 & 25 Vict. c. 97, s. 68, provide that, when any conviction is quashed on appeal, a memorandum thereof is to be made on the conviction, and a copy thereof is to be added to any copy or certificate of the conviction, and is to be sufficient evidence that the conviction has been quashed.

(*d*) *Giles v. Siney*, 11 Law T. 310.

(*e*) Bull. N. P. 249. *Rhodes's case*, 1 Leach, 24.

(*f*) *Rex v. Cropley*, 2 Esp. N. P. C. 524.

(*g*) *D'Israeli v. Jowett*, 1 Esp. N. P. C. 427.

(*h*) *Breton v. Cope*, Peake, N. P. C. 30. *Marsh v. Colnet*, 2 Esp. N. P. C. 665.

(*i*) *Rex v. Martin*, 2 Campb. 100.

(*j*) *Rex v. Aickles*, 1 Leach, 391.

(*k*) *Salte v. Thomas*, 3 B. & P. 188. 2 Phill. Ev. 164.

(*l*) *Ramsbottom's case*, 1 Leach, 25, in note. It would have been no bar to the conviction had the probate been unpealed. *Rex v. Buttery*, R. & R. 342.

(*m*) Bull. N. P. 247.

(*n*) *Sayer v. Glossop*, 2 Exch. R. 409.

(*o*) *Birt v. Barlow*, Dougl. 171. As to

are, however, in the nature of records, and need not be produced or proved by subscribing witnesses. (*p*) They, therefore, may be proved either by an examined copy or by a copy certified under the 14 & 15 Vict. c. 99, s. 14. (*q*)

The 6 & 7 Will. 4, c. 86, 'An Act for registering Births, Deaths, and Marriages in England,' by sec. 38 enacts that 'all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry.' (*r*)

By 37 & 38 Vict. c. 88 (Births and Deaths Registration Act, 1874) s. 38, 'an entry, or certified copy of an entry, of a birth or death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry, to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea (*rr*); and when more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry made after the commencement of this Act of the birth of such child in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth, unless such entry purports,

- (a) If it appear that not more than twelve months have so intervened, to be signed by the superintendent registrar, as well as by the registrar, or
- (b) If more than twelve months have so intervened, to have been made with the authority of the Registrar General, and in accordance with the prescribed rules.'

When more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or the finding of such body, the entry or certified copy of the entry made after the commencement of this Act of the death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules.'

By s. 49, where reference is made in this Act to a registrar or superintendent registrar in connexion with any birth or death or other event, or any register, such reference shall (unless the contrary be expressed) be deemed to be made to the registrar who is the registrar for the sub-district in which such birth or death or

mere similarity of names being evidence of identity, see *Hubbard v. Lees*, L. R. 1 Ex. 255, *post*, p. 434, *ante*, p. 314.

(*p*) Per Lord Mansfield, *Birt v. Barlow*, 1 Dougl. R. 171.

(*q*) *Post*, p. 427.

(*r*) The Marriage Act, 6 & 7 Will. 4, c. 85, s. 44, incorporates that Act with the 6 & 7 Will. 4, c. 86.

(*rr*) See sec. 37 of this Act, in the Appendix of Statutes.

other event took place, or who keeps the register in which the birth or death or other event is or is required to be registered, or who keeps the register referred to, and to the superintendent registrar who superintends such register as aforesaid.

By sec. 51, this Act, save as is herein otherwise expressly provided, shall extend only to England and Wales.

Non-parochial  
registers.

The 3 & 4 Vict. c. 92, which relates to registers or records of births or baptisms, deaths or burials, and marriages lawfully solemnized, kept in England and Wales, other than the parochial registers and the copies thereof deposited with the diocesan registrars, enacts that all registers and records deposited in the general register office by virtue of that Act (except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May Fair, at the Mint in Southwark, and elsewhere, which were deposited in the registry of the Bishop of London in 1821), shall be deemed to be in legal custody, and shall be receivable in evidence, subject to the provisions of that Act. By sec. 17, 'in all criminal cases in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the Court the original register or record.' (s)

By 27 & 28 Vict. c. 97, after reciting that provision is made by law in England for the registration of burials performed according to the rites of the Established Church, and of all burials in grounds provided under the Burials Act; and that it is expedient that all burials in England be registered: it is enacted as follows:

1. All burials in any burial ground in England which are not now by law required to be registered shall be registered in register books to be provided for each such burial ground by the company, body, or persons to whom the same belongs, and to be kept for that purpose according to the laws in force by which registers are required to be kept by rectors, vicars, or curates of parishes or ecclesiastical districts in England.

2. Such register books shall be so kept for every such burial ground by some officer or person to be appointed to that duty by the company, body, or persons to whom such burial ground belongs.

3. Copies of the register books kept under this Act for every such burial ground shall be from time to time made, verified, and signed by such officer or person as aforesaid, and sent by him to the registrar of the diocese wherein the burial ground to which the same relates is situate, to be kept with the copies of the register books of the parishes within such diocese.

5. The register books kept under this Act, or copies thereof, or extracts therefrom, shall be received in all courts as evidence of the burials entered therein.

Proof of public  
books by  
examined  
copies.

Whenever an original is of a public nature, and admissible in evidence, an examined copy is also admissible. (t) Thus examined copies of the entries in the council-book, or of a license preserved in the secretary of state's office, (u) of entries in the bank-books, (v)

(s) In civil cases, sec. 9 makes extracts stamped with the seal of the office admissible in evidence. The 21 & 22 Vict. c. 25, extends the provisions of the 3 & 4 Vict. c. 92, to other registers of a similar

description. See 37 & 38 Vict. c. 88, fifth schedule.

(t) *Lynch v. Clerke*, 3 Salk. 154.

(u) *Eyre v. Palsgrave*, 2 Campb. 606.

(v) *Marsh v. Colnett*, 2 Esp. 665.

of entries in the books of the East India Company, (*w*) or in the books of the commissioners of the land tax, (*x*) or of excise, (*y*) are allowed to be read in evidence. So an examined copy of a parish register is evidence; (*z*) but not an examined copy of the register of a marriage in the Swedish ambassador's chapel in Paris. (*a*) It seems, however, that the books of the King's Bench or Fleet prisons, which, as it has been just mentioned, are evidence of the time of a prisoner's discharge, are not such public documents that a copy of them may be given in evidence. (*b*)

And now by the 14 & 15 Vict. c. 99, s. 14, 'whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.' (*c*)

A copy of an entry in the register book of births in a registrar's district within a superintendent registrar's larger district, certified to be a true copy under the hand of the deputy superintendent registrar, who also certified under his hand that the register book was in his lawful custody, was held to be admissible evidence of the entry in the register book upon the mere production of such copy. (*d*)

The judicial records of the King's Courts are safely kept for public convenience, that any subject may have access to them for his necessary use and benefit; which was the ancient law of England, and is so declared by an Act of Parliament in the 46th year of Edward III. (*e*) But in the case of an acquittal on a prosecution for felony, a copy of the indictment cannot be regularly obtained without an order from the Court. (*f*) This rule, it

Examined or certified copies of documents admissible in evidence.

Inspection of records.

Copy of indictment after acquittal, how obtained.

(*w*) Dougl. 593, *n*.

(*x*) *Rex v. King*, 2 T. R. 234.

(*y*) *Fuller v. Fotch*, Carth. 346.

(*z*) Bull. N. P. 247.

(*a*) *Leader v. Barry*, 1 Esp. 353.

(*b*) *Salte v. Thomas*, 3 B. & P. 190. 2 Ph. Ev. 164.

(*c*) The provisions in this section are only cumulative, and do not restrict the proof to the mode pointed out by this section. *Reg. v. Manwaring*, D. & B. 132, where Williams, J., said, 'I must protest against it being supposed that I agree in the notion that when a document of a public nature cannot be produced the parties are tied down to any particular mode of secondary proof.' See *Dorrett v. Meux*, 15 C. B. 142, and see *Reg. v. Manwaring*, D. & B. 132, *ante*, p. 401, as to a certificate of a superintend-

ent registrar of the registration of a chapel.

(*d*) *R. v. Weaver*, 43 L. J. M. C. 13, 12 Cox, C. C. 527.

(*e*) 2 Phill. Ev. 174.

(*f*) This practice originated with an order made in the 16 Car. 2, by Hyde, Chief Justice of the King's Bench; Bridgman, Chief Justice of the Common Pleas; Twisden, J., Tyril, J., and Kelyng, J., 'to be observed by the justices of the peace and others at the sessions in the Old Bailey,' as follows:—'That no copies of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery upon motion, for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from prosecuting for the

In case of  
felonies.

In cases of  
misdemeanor.

Inspection of  
depositions.

is said, proceeds from an anxiety to protect prosecutors from being harassed by unfounded actions for malicious prosecutions, which actions cannot be maintained without proving the fact of the prosecution by the record or an examined copy of it; and it has also been said that it is not usual to grant a copy of the record of acquittal, where there is any the least probable cause for the prosecution. (*g*) But the copy is admissible without proof of the order of the Court allowing a copy of the record; for though it be the duty of the officer charged with the custody of the records of the Court not to produce a record, or give a copy of it but upon competent authority, yet if the officer, in neglect of his duty, shall have given a copy, or produces the original, the evidence in itself is unobjectionable, and must be received. (*h*) The rule is confined to cases of felony; in prosecutions for misdemeanors the defendant is entitled to a copy of the record, as a matter of right, without a previous application to the Court. (*i*) Formerly a defendant on a criminal charge was not entitled to an inspection of the grounds upon which the prosecution was instituted; (*j*) and, therefore, neither in cases of treason nor of felony had he any right to a copy of the depositions of the witnesses who were to appear against him. (*k*)

King upon great occasions.' Kel. 3. The jurisdiction of these judges to make this order appears extremely questionable, and has been frequently doubted. See *Browne v. Cumming*, 10 B. & C. 70, and the authorities there referred to. In *Rex v. Brangan*, 1 Leach, 27, the prisoner, having been acquitted, applied for a copy of the indictment; but Willes, C. J., admitting that the prosecution bore the strongest marks of being malicious, refused the application, because it was not necessary that he should grant it, declaring that by the laws of this realm every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use he might think fit to make of it, &c.; and that after a demand of it had been made the proper officer might be punished for refusing to make it out. In *Browne v. Cumming*, the court expressed no opinion as to the authority of the judges to make the order, but refused to restrain the plaintiff from using a copy of an indictment alleged to have been improperly obtained, on the ground that, taking all the facts together, they did not think there had been a mistake or misrepresentation of such a nature as to call upon the court to interfere. The order in question, if not expressly overruled, is much shaken by *Rex v. The Justices of Middlesex*, 5 B. & Ad. 1113. In that case Bowman had been tried and convicted of larceny at the Clerkenwell sessions, after those sessions had lapsed for want of an adjournment, and being indicted for the same offence afterwards, at the Old Bailey, he proposed to plead *autrefois convict*, and the court adjourned the case to give time for an application for a copy of the record; *Rex v. Bowman*, 6 C. & P.

101; and an application was afterwards made to the clerk of the peace for a copy of the record, which was refused. And the Court of Queen's Bench granted a mandamus to make up the record of the proceedings against Bowman, on the ground that 'the prisoner had a right to have the record of the proceedings which passed at the sessions correctly made up, and to make any use of it he could.' The report in *Rex v. The Justices of Middlesex* erroneously states the application for the mandamus to have been after the prisoner had pleaded his former conviction. See *Rex v. Bowman*, 6 C. & P. 101, and 337. This case seems to overrule *Rex v. Vandercomb*, 2 Leach, 708, and *Rex v. Parry*, 7 C. & P. 836, where the court refused to grant the prisoners copies of their indictments, in order to enable them to plead *autrefois acquit*, and seems to establish the position that the prisoner is entitled, *as of right*, to a copy of the indictment for such a purpose; and, if for such a purpose, it is difficult to see why he should not have the same right for the purpose of instituting a civil suit to seek reparation for the injury which he has sustained by the malicious conduct of the prosecutor. C. S. G.

(*g*) *Tidd*. 647. *Groenvelt v. Barrett*, 1 Ld. Raym. 253. It seems that a person acquitted is entitled to a copy of the record as a matter of right. See note (*f*), *supra*.

(*h*) *Legatt v. Tollervey*, 14 East, 302.

(*i*) *Morrison v. Kelly*, 1 Black. Rep. 385. *Evans v. Phillips*, MS. Selw. N. P. 952. 2 Phill. Ev. 176.

(*j*) 2 Phill. Ev. 178.

(*k*) 2 Phill. Ev. 178. In some species of treason the prisoner is entitled to a copy of the indictment, *ibid.* *Rex v. Hol-*

But now the 6 & 7 Will. 4, c. 114, 'An Act for enabling persons indicted of felony to make their defence by counsel or attorney,' by sec. 3 enacts 'that all persons who after the passing of this Act shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have, on demand (from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same), copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail, or committed to prison, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words: provided always, that if such demand shall not be made before the day appointed for the commencement of the assize or sessions at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged.'

6 & 7 Will. 4,  
c. 114, s. 3.

Copies of depositions to be allowed to prisoners.

Sec. 4. 'All persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the Court before which such trial shall be had.' (b)

Prisoners entitled to inspect depositions on trial.

The 11 & 12 Vict. c. 42, s. 34, repealed this Act so far 'as relates to the right of parties charged with offences to have copies

After examinations are completed,

land; 4 T. R. 691. In that case an information had been filed against an officer of the East India Company, on charges of delinquency founded upon a report of a board of inquiry in India: and the Court of King's Bench were of opinion that he had no right to have an inspection of that report, and that the court had no discretionary power to grant it.

(2) Sec. 1, reciting that 'it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them,' enacts that 'all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attorneys practise as counsel.' Sec. 2, providing that in all cases of summary conviction persons accused shall be admitted to make their full answer, &c., is repealed by the 11 & 12 Vict. c. 42, but re-enacted by sec. 12. As to the practice which has prevailed since this statute passed, it has been held that a prisoner's counsel cannot be permitted to tell the jury any facts which he has heard from the prisoner, but which he is not in a condition to prove. *Reg. v. Butcher*, 2 M. & Rob. 228, *Coleridge, J.* If the prisoner does not employ counsel, he is at liberty

to make a statement for himself, and tell his own story, which is to have such weight with the jury as, all circumstances considered, it is entitled to; but if he employs counsel he must submit to the rules which have been established with respect to the conducting cases by counsel. *Reg. v. Beard*, 8 C. & P. 142, *Coleridge, J.* And the same learned judge held that after the prisoner's counsel had addressed the jury for him, the prisoner himself was not at liberty also to address them. *Reg. v. Boucher*, 8 C. & P. 141. But where on an indictment for maliciously wounding the prosecutor when no other person was present, the prisoner had made a statement before the magistrate, which was not put in by the counsel for the prosecution; *Alderson, B.*, permitted the prisoner to make a statement before his counsel addressed the jury, and then his counsel addressed the jury and commented on the prisoner's statement as according with the evidence, and only supplying what was otherwise deficient in it. The learned Baron said, 'I think it is right that a person should have an opportunity of stating such facts as he may think material, and that his counsel should be allowed to comment on that statement, as one of the circumstances of the case. On trials for high treason the prisoner is always allowed to make his own

defendant entitled to copies of the depositions.

of the depositions or examinations against them,' and by sec. 27 enacts that 'at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions or other first sitting of the Court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words.'

Persons against whom coroner's jury have found verdict of manslaughter to be supplied with depositions.

The 22 & 23 Vict. c. 33, which authorizes coroners to admit to bail any person against whom a verdict of manslaughter has been found, by sec. 3 enacts that 'at any time after all the depositions of witnesses shall have been taken, every person against whom any coroner's jury may have found a verdict of manslaughter shall be entitled to have from the person having custody thereof copies of the depositions on which such verdict shall have been found, on payment of a reasonable sum for the same, not exceeding the rate of three halfpence for every folio of ninety words.' (m)

statement after his counsel has addressed the jury. It is true that the prisoner's statement may often defeat the defence intended by his counsel; but if so the ends of justice will be furthered; besides, it is often the genuine defence of the party, and not a mere imaginary case invented by the ingenuity of counsel.' *Reg. v. Malings*, 8 C. & P. 242. And at the same assizes Gurney, B., after conferring with Alderson, B., allowed a similar course to be adopted, but said that he thought it ought not to be drawn into a precedent; and the prisoner read a written statement. *Reg. v. Walking*, 8 C. & P. 243. The report does not state what the particular facts were in this case. Alderson, B., allowed the same course in *Reg. v. Dyer*, 1 Cox, C. C. 113, and *Reg. v. Williams*, 1 Cox, C. C. 363; and in *Reg. v. Manzano*, 2 F. & F. 64, Martin, B., after consulting Channell, B., allowed the same course, as there was a precedent for it in 8 C. & P., although he was entirely opposed to the practice. But where on an indictment for child-murder the two previous cases in 8 C. & P. were cited, and permission asked for the prisoner to make a statement, Patteson, J., said, 'The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed. If the prisoner were allowed to make a statement, and stated as a fact anything which could not be proved by evidence, the jury should dismiss that statement from their minds; but if what the prisoner states is merely a comment on what is already in evidence, his counsel can do that much better than he can.' The prisoner did not make any statement. *Reg. v. Rider*, 8 C. & P. 539. And where on an indictment for manslaughter the

uttering base coin, a prisoner wished to make a statement of facts to the jury before his counsel addressed them, and it was said that Lord Denman, C. J., had allowed it to be done; Bosanquet, J., refused to permit it, and observed that he was not informed of the circumstances of the cases decided on this Act, which he thought could only be meant to put prisoners in the same situation in felonies as they were in before in misdemeanors, and in those cases certainly a defendant could not be allowed the privilege of two statements, one by himself, and one by his counsel. *Reg. v. Burrows*, 2 M. & Rob. 124. And so where *Reg. v. Dyer*, *supra*, and *Reg. v. Malins*, *supra* were cited, Byles, J., refused to allow the prisoner to state his defence before his counsel addressed the jury, but gave the prisoner the option of either speaking himself or having his counsel speak for him. No facts are stated in this case, which was a Mint prosecution. *Reg. v. Taylor*, 1 F. & F. 535. Counsel for the prosecution, except in very simple cases, open the case before calling witnesses. See *Rex v. Gascoine*, 7 C. & P. 772. *S. P. Reg. v. Morgan*, 6 Cox, C. C. 116, per Talford, J.

(m) This section is as clearly confined to cases of manslaughter as the previous sections as to bail in cases of manslaughter. Two questions arise respecting the 6 & 7 Will. 4, c. 114, s. 3: 1st, Did that section apply to depositions before a coroner? In *Reg. v. White*, 5 Cox, C. C. 562, Platt, B., held that it did; and this ruling seems to be correct; for the paramount intent of the Act to give the prisoner copies of the depositions in all cases is so clear, and the absurdity of holding that a person committed for murder is not entitled to copies of the depositions before



At a meeting of the judges after the passing of the 6 & 7 Will. 4, c. 114, for the purpose of choosing the Spring Circuits of 1837 (Littledale, J., Bosanquet, J., and Coleridge, J., being absent from indisposition), a discussion took place as to some points which were thought likely to occur at the assizes, in consequence of the recent Act for allowing prisoners indicted for felony to make full defence by counsel; and the course of practice which the judges present thought it would be most advisable to adopt will be found in 7 C. & P. 676. Rules 1, 2, & 3, as to cross-examining a witness on his deposition made before a magistrate, are obsolete, by reason of 28 & 29 Vict. c. 18, noticed *post*.

Rules as to the practice after the passing of this statute.

Rule 4. If the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do. (o)

Rule 5. In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner. (p)

magistrates, is so great, that the reasonable construction of the clause is that the prisoner is entitled to copies in both cases alike; though Mr. Archbold Jerv. Acts, 84, 2nd ed., has expressed a strong doubt on the point. The next question is, how far is the section repealed by the 11 & 12 Vict. c. 42, s. 34? That clause was not referred to in Reg. v. White, which was decided after that Act passed. That case, therefore, can hardly be treated as an authority that the clause is not repealed as to depositions before a coroner; but, although the terms of the repeal are wide, it should seem that they may reasonably be limited so as only to repeal the clause as to depositions before magistrates; for a verdict of murder or manslaughter may be found by a coroner's jury against a person who is not present at the inquest, and it can hardly be correctly said that any person is *charged with an offence* before a coroner, or that the depositions are taken *against* any one on the holding of an inquest. If this reasoning be correct, the 22 & 23 Vict. c. 33, s. 3, was unnecessary, and the difficulty arising from that clause being confined to manslaughter is immaterial.

The 6 & 7 Will. 4, c. 114, gave the prisoner no *right* to copies of the depositions after the commencement of the assizes or sessions, unless the court were of opinion that the copies might be made without inconvenience; and this part of the section does not appear to be affected by the repeal, as the repeal only extends to 'the *right* of parties charged with offences to have copies.'

(o) See *ante*, p. 390. It is not usual to reply when witnesses to character alone are called.

(p) 7 C. & P. 676. In *Rex v. Marsden*, M. & M. 439, an indictment for publishing a libel on the Duke of Wel-

lington, the Attorney-General, instructed by the Solicitor for the Treasury, conducted the prosecution, and stated, in answer to an objection that he was not entitled to reply, that he appeared in his official capacity; Lord Tenterden, C. J., said, 'There is no doubt of the rule; wherever the King's counsel appears officially, he is entitled to reply.' But on the same day in *Rex v. Bell*, *ibid.* 440, a criminal information for a libel on the Lord Chancellor, the Attorney-General stated that he appeared as the counsel and private friend of the Lord Chancellor, and, no evidence being offered in defence, he did not reply. In *Reg. v. Gardner*, 1 C. & K. 628, an indictment for stealing money out of a postletter, Whately, Q.C., claimed the reply, as he represented the Attorney-General; but it was urged that this was like a prosecution by any other of the public departments. Pollock, C.B., 'If this is a prosecution by the Attorney-General, those who represent him, though not usually counsel for the Crown, have the right to reply, as in the Mint cases at the Old Bailey.' [On the Oxford circuit I never knew the right to reply claimed in a Mint case. I was myself counsel for the Mint at Hereford, Monmouth, and Gloucester for many years, and never claimed, or had it suggested to me that I should claim, the reply where no evidence was given for the prisoner.] And in *Reg. v. Taylor*, 1 F. & F. 535, which was a Mint prosecution on circuit, Byles, J., would not admit the right of reply. In *Reg. v. Beckwith*, 7 Cox, C. C. 505, an indictment for forging voting papers at an election of guardians of the poor, the prosecution had been directed by the Poor Law Board, and Bliss, Q.C., stated that he appeared for the Attorney-General and claimed the reply; citing *Reg.*

A prisoner is not entitled to a copy of his examination.

A prisoner is not entitled under the Act to a copy of his own examination, taken before the committing magistrate, which has been returned with the depositions, but only to a copy of the depositions of the witnesses against him. (q) This decision, observes Mr. Phillipps, (r) is founded on the express language of the Act, which speaks of depositions of witnesses, and says nothing of the examinations of prisoners. Yet it may in some cases be as necessary for the full defence of the prisoner that he should be furnished with a copy of his own statement taken in writing before the magistrate, as it is to have a copy of the depositions, especially where a part of the case for the prosecution consists of evidence intended to disprove or contradict the prisoner's statement. In such a case, if it were necessary for the ends of justice, the judge, by virtue of his judicial authority, might allow the prisoner to inspect his written examination. (s)

A prisoner must be held to bail or committed for trial to be entitled to a copy of the depositions.

It was held that a prisoner was not entitled, under the 6 & 7 Will. 4, c. 114, s. 3, to copies of the depositions until he was finally committed or held to bail for the purpose of trial, and therefore he was not so entitled on being committed for further examination, (t) and it has also been held that a prisoner is not entitled, under the 11 & 12 Vict. c. 43, s. 27, to such copies, unless he has either been committed to prison to take his trial at a particular time, or has been admitted to bail to make his appearance at a certain time, for the purpose of being tried; and therefore a person committed till the next sessions for want of sureties to keep the peace, and then do what should be enjoined him by the court, is not entitled to copies of the depositions taken against him. (u)

Additional evidence.

Where additional evidence has been obtained after the commitment, but no depositions containing such evidence taken, the court has no authority to order a copy of such evidence. (v)

Depositions against another.

Where the prisoner was committed for receiving iron, knowing it to have been stolen, and a person, who had been committed as having stolen the iron, was admitted as a witness for the Crown, Patteson, J., allowed the prisoner's counsel to inspect the depositions which had been returned against the person charged as the thief. (w)

Before a coroner.

Where a true bill was found against a prisoner for the murder

v. Gardner; but Byles, J., said, 'I am of opinion that the right to reply where the prisoner calls no witnesses ought to be limited to the Attorney-General when prosecuting in person, and if I could do so, I would not allow it even in that case. I certainly cannot permit it under any other circumstances,' and refused to allow a reply. In Reg. v. Christie, 7 Cox, C. C. 506, an indictment for murder on the sea, Bliss, Q. C., at the close of the case for the prosecution, claimed the reply under any circumstances, as he appeared *ex officio* as Attorney-General of the County Palatine of Lancaster; Martin, B., 'I cannot admit your claim; the right is a very objectionable one; I shall limit it wherever possible, and I wish I could prevent even the Attorney-General

of England from exercising it.' C. G. S.

(q) Reg. v. Aylett, 8 C. & P. 669, Littledale, J., and Parke, B.

(r) 2 Phill. Ev. 181.

(s) See per Coleridge, J., in *Ex parte Greenacre*, note (x), *infra*.

(t) Reg. v. Mayor of London, 5 Q. B. 555.

(u) *Ex parte* Humphrys, 4 Sess. C. 179, Coleridge, J., who seemed also clearly of opinion that a prisoner would have no right to a copy of the depositions after he had been tried.

(v) Reg. v. Connor, 1 Cox, C. C. 233, Patteson, J.

(w) Reg. v. Walford, 8 C. & P. 767. The report does not state whether these depositions were taken in the presence or absence of the prisoner.

of a person, on the investigation of whose death the coroner's jury returned a verdict of 'Wilful murder against some person or persons unknown,' and the depositions taken before the coroner were in the possession of the officer of the court before whom the prisoner was to be tried; it was held that, although the coroner could not have been compelled to return the depositions under the 7 Geo. 4, c. 64, s. 4, yet the judges had power by their general authority as a court of justice, if they thought it essential to the interests of justice, to order a copy of them to be given to the prisoner. (x)

Where a prisoner was indicted for obtaining money by falsely pretending that a parcel contained a number of letters, and those letters had been seized under a search-warrant, and were in the possession of the prosecutrix, who had written and sent them to the prisoner, an order was made by the Central Criminal Court for an inspection of the letters, but not for copies. (y)

Letters.

Where civil rights are depending, a party has a right to inspect, and take copies of such books, &c., as are of a *public* nature, wherein he has an interest; (z) but a rule for inspecting a public writing is never granted, where the party who has them in his custody would, by producing them for inspection, expose himself to a criminal prosecution; for in *criminal cases* a party is never compelled to furnish evidence against himself. (a)

Inspection of public books.

2ndly. Of the proof of private documents. Before the 28 & 29 Vict. c. 18, the execution of all written instruments which were attested, whether under seal or not, must have been proved by the subscribing witness, if he could be produced, and was capable of being examined. (b) And this although he had become blind, as he might, from his recollection of the transaction, give most important evidence respecting it. (c) But where the attesting witness was dead, (d) or insane, (e) or absent in a foreign country, or not amenable to the process of the superior courts, (f) as where he was in Ireland, (g) or where he could not be found after diligent inquiry, (h) evidence of the witness's handwriting was admissible. (i) In these cases the proof of the subscribing witness's handwriting was evidence of the execution of the instrument by the party therein named, whose signature the instrument purported to bear; and for the purpose of proving the execution, that is, that the instrument was executed by the party so named, it was not necessary to prove the handwriting of the party. (j)

2. Of the proof of private documents.

(x) *Ex parte Greenacre*, 8 C. & P. 32, Littledale, J., and Coleridge, J., and per Coleridge, J., 'Supposing these depositions had been against some other person tried a year ago for an offence with which this particular prisoner had nothing to do, yet if we had them, have we not authority as a court of justice, if we think it essential to the interests of justice, to order a copy of them to be given to him? I think that we have.'

(y) *Reg. v. Colucci*, 3 F. & F. 103. *Quære* whether these letters were not the property of the prisoner; and *quære* the right to issue a search-warrant for them. C. S. G.

(z) Tidd. 647.

(a) Tidd. 649. As to the inspection

of bankers' books under the Bankers' Books Evidence Act, 1876, see s. 6 of the Act, *post*, 439 and Appendix.

(b) *Doe v. Durnford*, 2 M. & S. 62. *Higgs v. Dixon*, 2 Stark. N. P. C. 180. *Abbot v. Plumbe*, 1 Dougl. 216. *Whyman v. Garth*, 8 Exch. R. 803.

(c) *Crönk v. Frith*, 9 C. & P. 197, Lord Abinger, C. B., 2 M. & Rob. 262.

(d) *Anon.* 12 Mod. 607. See *Reg. v. St. Giles*, 1 E. & B. 642.

(e) *Currie v. Child*, 3 Campb. 283.

(f) *Prince v. Blackburn*, 2 East, 250.

(g) *Hodnett v. Forman*, 1 Stark. N. P. C. 90.

(h) *Cunliffe v. Sefton*, 2 East, 183.

(i) *Phill. Ev.* 210, *et seq.*

(j) 2 Phill. Ev. 214.

Where proof  
by attesting  
witness is  
unnecessary.

Lost instru-  
ment.

Evidence of  
identity.

But now by the 28 & 29 Vict. c. 18, s. 7, 'it shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness.'

Where an instrument is lost the execution by the parties may be proved. (*k*) It seems that in a case where attestation was requisite where the attesting witness to a lost instrument is dead, it is unnecessary to prove his handwriting, unless it be necessary for the purpose of proving his identity. (*l*) Under particular circumstances an instrument signed by one prisoner and attested by another prisoner was held to be admissible against both upon proof of their signatures. (*m*) Where, before the above Act, the attesting witness to a promissory note was in Canada, and his handwriting was proved by his nephew, who did not know where either the defendant or the plaintiff lived, or anything about the defendant, or about his making his mark to the note, the Court of Exchequer held that this was insufficient; for although proof of the attestation would be evidence of everything on the face of the instrument, viz., of everything he as attesting witness asserted, yet by his attestation he does not assert that *this defendant* signed the note; but that *some* F. M. did; that F. M. is left unidentified and unconnected with the person sued; but the issue to be proved is that *this* F. M. executed. (*n*) So where an attesting witness to a promissory note proved that the signature Hugh Jones was written on the note in his presence by a Hugh Jones who kept a public-house at a particular place in Anglesea, but he had not seen him since the date of the note, and the name was a very common one in Anglesea; it was held, on the authority of the preceding case, that there was no sufficient evidence to go to the jury of the identity of the person who had signed the note with the defendant, against whom the action was brought upon the note. (*o*) But where a bill of exchange was directed to 'Charles Banner Crawford, East India House,' and a witness proved that the handwriting of the acceptance, 'C. B. Crawford,' was that of a clerk of that name in the East India House, who had left it five years ago, but he did not know whether he was the defendant in the action; it was held that there was sufficient evidence of the identity. (*p*) So where three bills of exchange were accepted in the name of Henry Thomas

(*k*) *Keeling v. Ball*, Peake, Ev. App. xxxii.

(*l*) *Reg. v. St. Giles*, 1 E. & B. 642. 22 L. J. M. C. 54.

(*m*) *Reg. v. Marsh*, 1 Den. C. C. 505.

This was an indictment against Marsh and Lord for attempting to obtain money from an Insurance Company by a false claim in writing for a loss of a horse, which was signed by Marsh and attested by Lord; and Wightman, J., held that the document was admissible on proof of the handwriting of the prisoners without calling Lord as a witness. The point was reserved, but the case went off on an objection to the indictment, see vol. 2, p. 594, and this point was not noticed. It should be noticed, that in

this case the instrument was put in evidence as part of the fraud charged against both prisoners.

(*n*) *Whitlock v. Musgrave*, 3 Tyrw. 541, C. & M. 521.

(*o*) *Jones v. Jones*, 9 M. & W. 75. Parke, B., 'The plaintiff might have called the defendant's attorney to say whether the person who employed him was the Hugh Jones who kept the public house.' Lord Abinger, C. B., said, 'The argument for the plaintiff might be correct, if the case had not introduced the existence of many Hugh Joneses in the neighbourhood where the note was made.'

(*p*) *Greenshields v. Crawford*, 9 M. & W. 314.

Ryde, and made payable at the Regent Street branch of the London and Westminster Bank, and the cashier of that bank proved that he knew the handwriting of Henry Thomas Ryde, and that the acceptances were in his writing, that he had kept an account at the Regent Street branch, but his only means of knowledge as to the handwriting consisted in his having as cashier paid cheques drawn in the name of Henry Thomas Ryde, whom he did not know and had never seen write; it was held that there was sufficient evidence of identity of the person who had accepted the bills with Henry Thomas Ryde, the defendant in an action brought upon those bills. (q) So where a witness proved that he saw a person of the name of William Seal Evans write a letter about five years ago, which letter was produced, and established a case against the defendant, William Seal Evans, for goods sold and delivered, if the identity of the writer and the defendant were shown, but the witness had not seen the person since, and did not know whether he was the defendant; it was held that there was sufficient evidence of the identity. (r) Evidence that the defendant was present when the instrument was prepared, (s) or that he had made acknowledgments respecting it, (t) would be sufficient to connect him with the instrument. And if an instrument describes a party on the face of it by name, place of abode, and trade (as F. M. of R. in the county of Y., carpenter), the cases establish that proof of the handwriting of the subscribing witness would be sufficient to show that it was signed by a person truly described as being of that name and place; but still the plaintiff must show that the defendant corresponds with that description. (u) So where in an action against James Roberts, as a petitioning creditor, it appeared from the proceedings in the Bankruptcy that the petitioning creditor was James Roberts; it was held that this was sufficient *prima facie* evidence of identity. (v) So where a genuine licence was proved under the seal of the Apothecaries' Company, which granted a right to practise and dispense medicines as an apothecary to a person of the same Christian and surname as the

(q) Roden v. Ryde, 4 Q. B. 626.

(r) Sewell v. Evans, 4 Q. B. 626.

This and the preceding case were decided at the same time. The grounds of the decision seem to have been, that where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were one of very frequent occurrence, there might not be much ground for drawing the conclusion; but where a name is not so common, the inference would be different. The supposition that the right man has been sued is reasonable, because, if not, he might so easily prove that he was not the person, and on account of the danger a party would incur if he served process on a wrong party intentionally. In a criminal case it seems that in general the mere fact that a person of the same name as the prisoner signed a document or the like would not be considered sufficient evidence of identity. See Logan v. Allen, 3 Tyrw. 557, where Bolland, B., said,

'Suppose a person to be tried for forging the signature of W. R. Alder of H. House to a bond, and that the subscribing witness said, "I saw that bond signed at the inn I keep, but I never saw the party executing before or since," could that prisoner's case be left to the jury?' See Roden v. Ryde, *supra*, per Patteson, J., and Lord Denman, C. J. In Reg. v. Ellen Murtagh, 6 Cox, C. C. 447, the prisoner was indicted for making a false declaration, and it was proved that the declaration was made by a woman describing herself as Ellen Murtagh, and that she affixed her mark to it, but the witnesses were unable to identify the prisoner as that woman, and a statement of the prisoner having been held inadmissible, she was acquitted, and it was not even suggested that there was any evidence to go to the jury. Pennefather, B., and Moore, J.

(s) Nelson v. Whittall, 1 B. & A. 19.

(t) Whitelock v. Musgrave, *supra*.

(u) Whitelock v. Musgrave, *supra*,

(v) Hamber v. Roberts, 7 C. B. 861.

plaintiff, who had acted as an apothecary, prescribing and dispensing medicines to his patients; it was held that there was ample evidence to go to the jury of the identity of the plaintiff with the person named in the licence. (*vv*) So where in an action against a pilot for negligence in the management of a vessel, it was objected that no evidence had been given that the defendant was the pilot, whereon the plaintiff's counsel called out Mr. Henderson, intending to call the defendant's son as a witness to prove that fact, when a person answered him and said, 'I am the pilot;' he was not sworn, but was proved to have been acting as pilot at the time of the accident; it was held that there was some evidence of identity, as the name and calling resembled those of the defendant. (*w*)

Handwriting  
how proved.

In *Doe d. Mudd v. Suckermore*, 5 Ad. & E. p. 730, Patteson, J., is reported to have said, 'All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker, according to the number of times and the periods, and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; *Garrells v. Alexander* (*x*), *Powell v. Ford*, (*y*) *Lewis v. Sapio*; (*z*) or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party. *Lord Ferrers v. Shirley*, (*a*) *Buller's Nisi Prius*, 236, *Carey v. Pitt*, (*b*) *Thorpe v. Gisburne*, (*c*) *Harrington v. Fry*, (*d*) evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting, which have hitherto, as far as I have been able to discover, in our law been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting. In both the witness acquires his knowledge by his own observations upon facts coming under his own eye, and as to which he does not rely

(*vv*) *Simpson v. Dismore*, 9 M. & W. 47, and see *Russell v. Smyth*, 9 M. & W. 310, where the same Christian and surname, profession, residence, and age of a person named in a suit as those of the defendant were held sufficient evidence of identity of the party named in the suit with the defendant.

(*w*) *Smith v. Henderson*, 9 M. & W. 978.

(*x*) 4 Esp. 37.

(*y*) 2 Stark. N. P. C. 164.

(*z*) M. & M. 39.

(*a*) Fitzg. 195.

(*b*) Peake, Add. Ca. 130.

(*c*) 2 C. & P. 21.

(*d*) R. & M. 90.

on the information of others, and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may so say, unintentionally, without reference to any particular object, person, or document.

If a witness states that he has only seen a party write once, but thinks the signature is his handwriting, it is evidence to go to the jury. (e) Where on an information for a libel, in order to show that certain letters were in the handwriting of the defendant, a witness proved that he had never seen the defendant write, but he had seen a number of letters, which purported to have come from him on the subject of a cause in which he was engaged on one side, and the witness on the other side, and the witness had acted upon those letters in the course of the cause; Lord Tenterden, C. J., held that the witness was competent to prove the defendant's handwriting. (f) But where an attorney for three defendants stated that he did not know the handwriting of one of the defendants, but before undertaking to defend the action, he had required a retainer signed by all three defendants, and had received a retainer purporting to be signed by all the defendants, upon which he had acted; it was held that the attorney was not competent to prove the handwriting of the one defendant; for one of the other two defendants might have signed the retainer for him with his assent. (g) Where a witness had observed a name signed to an affidavit, which had been used by the plaintiff's counsel in answer to an application to postpone the cause, and in the affidavit it was sworn that the party signing it was the plaintiff's wife; Park, J. A. J., held that the witness might speak to that person's name as the attesting witness to an agreement purporting to be signed by the plaintiff. (h)

Before the 28 & 29 Vict. c. 18, it was an established rule, that handwriting could not be proved by comparing the paper with any other papers acknowledged to be genuine. (i)

Comparison of handwriting.

But now by the 28 & 29 Vict. c. 18, s. 8, 'comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses (j) respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.' (k)

(e) *Garrels v. Alexander*, 4 Esp. 37. *Lewis v. Sapio*, M. & Malk. N. P. C. 39. by Abbott, C. J. *Stranger v. Searle*, 1 Esp. 14. *R. v. Crouch*, 4 Cox, C. C. 163. *R. v. Barber*, 1 C. & K. 434. A witness may prove the identity of a mark from having seen the person make it on several occasions. *George v. Surrey*, M. & M. 516.

(f) *Rex v. Slaney*, 5 C. & P. 213.

(g) *Drew v. Prior*, 5 M. & Gr. 264.

(h) *Smith v. Sainsbury*, 5 C. & P. 196. But see *Greaves v. Hunter*, 2 C. & P. 477.

(i) *Reg. v. Wilton*, 1 F. & F. 391, *Bramwell*, B. *Reg. v. Coleman*, 6 Cox, C. C. 163. *Reg. v. Shepherd*, 1 Cox, C. C. 237, *Erle*, J. *Griffith v. Williams*, 1 Cr. & J. 47. *Doe d. Perry v. Newton*, 5 A. & E. 514. 1 Nev. & P. 4. *South v. Yarrow*, 1 M. & Rob. 133. *Eaton v.*

*Jervis*, 8 C. & P. 273. *Bromage v. Rice*, 7 C. & P. 548.

(j) See *R. v. Harvey*, 11 Cox, C. C. 546. *R. v. Williams*, 9 Cox, C. C. 448.

(k) This clause extends by sec. 1, 'to all courts of judicature, as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence.' See *Doe d. Mudd v. Suckermore*, 5 A. & E. 702. 2 Nev. & P. 16. *R. v. Cator*, 4 Esp. 107. *Goodtitle v. Braham*, 4 T. R. 497. *Gurner v. Longlands*, 5 B. & A. 330. As to cross-examining a witness as to other documents which were not in evidence in the case, before this Act, see *Young v. Honner*, 2 M. & Rob. 536. 1 C. & K. 51. *Griffiths v. Ivory*, 11 Ad. & E. 322. *Hughes v. Rogers*, 8 M. & W. 123. *Parke*, B.

This section allows documents proved to be genuine but not relevant to the issue to be put in for the purpose of comparison. (*l*) The genuineness of such documents must be decided by the judge. (*m*) It seems that a person may write something in court for the express purpose of comparison under this section. A document, however, written under such circumstances, cannot altogether be relied on as representing the writer's ordinary handwriting. (*n*)

Peculiar  
spelling of  
words.

If a person has been in the habit of spelling a word in an unusual manner, that is some evidence that a writing containing that word so spelled was written by that person, the value of such evidence depending on the degree of peculiarity in the mode of spelling and the number of occasions on which the person has used it; and the proof of such habit is not confined to the evidence of a witness who is acquainted with it from having seen the person write or correspond with him, but one or more specimens written by him with that peculiar orthography (*o*) will be admissible; for the object is not to show similarity of the form of the letters and mode of writing of a particular word or words, but to prove a particular mode of spelling a word, which may be evidenced by the person having orally spelt it in a different way, or written it in that way once or oftener in any sort of characters, the more frequently the greater the value of the evidence. Letters, therefore, written by a plaintiff, in which the defendant's name was improperly spelled Titchborne instead of Tichborne, were held to be admissible in evidence, in order to show that a libel in which the name was spelt in the same erroneous manner was in fact written by the plaintiff. (*p*)

As to the examination of skilled witnesses as to genuineness of writing, see *post*, Book 6, ch. 5. s. 2.

Proof of  
ancient docu-  
ments,

A copy of a parish register purporting to be signed by the curate eighty years ago may be received with no other proof of handwriting than the evidence of the present parish clerk, who speaks from his having seen the same handwriting attached to other entries in the register. (*q*)

Unstamped  
documents are  
admissible in  
criminal  
cases,

Formerly a written instrument, which required a stamp, was inadmissible, as a general rule, in criminal as well as civil cases, unless it were duly stamped, and no parol evidence could be received of its contents. But now by the 17 & 18 Vict. c. 83, s. 27, 'every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon or affixed thereto.' (*r*)

Banking books  
and copies of  
entries in  
same when  
evidence.

By 39 & 40 Vict. c. 48 (the Bankers' Books Evidence Act, 1876), s. 3, from and after the commencement of this Act (11th August, 1876), the entries in ledgers, day books, cash books, and

(*l*) *Birch v. Ridgway*, 1 F. & F. 270. *Cresswell v. Jackson*, 2 F. & F. 24.

(*m*) *Cooper v. Dawson*, 1 F. & F. 550. *Bartlett v. Smith*, 11 M. & W. 483.

(*n*) See *Cobbett v. Kilminster*, 4 F. & F. 490. *Arbon v. Fussell*, 3 F. & F. 152. *R. v. Aldridge*, 3 F. & F. 781. *Williams's case*, 1 Lew. 137. *R. v. Taylor*, 6 Cox, C. C. 58.

(*o*) *Quere* 'cacography.'

(*p*) *Brookes v. Tichborne*, 5 Exch. R. 929.

(*q*) *Doe d. Jenkins v. Davies*, 10 Q. B. 314. As to proof of ancient writings, see cases cited, *Doe d. Mudd v. Suckermore*, 5 Ad. & E. 718.

(*r*) See 33 & 34 Vict. c. 97, the Stamp Act, 1870, s. 17, which, except in criminal proceedings, prevents unstamped documents being given in evidence.



other account books of any bank (s) shall be admissible in all legal proceedings (t) as *prima facie* evidence of the matters, transactions, and accounts recorded therein on proof being given by the affidavit in writing of one of the partners, managers, or officers of such bank, or by other evidence that such ledgers, day books, cash books, or other account books are or have been the ordinary books of such bank, and that the said entries have been made in usual and ordinary course of business, and that such books are in or come immediately from the custody or control of such bank. Nothing in this clause contained shall apply to any legal proceeding to which any bank whose ledgers, day books, cash books, and other account books may be required to be produced in evidence shall be a party.

Sec. 4. Copies of all entries in any ledgers, day books, cash books, or other account books used by any such bank may be proved in all legal proceedings as evidence of such entries without production of the originals, by means of the affidavit of a person who has examined the same, stating the fact of said examination, and that the copies sought to be put in evidence are correct.

Sec. 5. Provided always, that no ledger, day book, cash book, or other account book of any such bank, and no copies of entries therein contained, shall be adduced or received in evidence under this Act, unless five days' notice in writing, or such other notice as may be ordered by the court, (u) containing a copy of the entries proposed to be adduced and of the intention to adduce the same in evidence, shall have been given by the party proposing to adduce the same in evidence to the other party or parties to the said legal proceeding, and that such other party or parties is or are at liberty to inspect the original entries and the accounts of which such entries form a part. (v)

Sec. 7. On the application of any party to any legal proceedings who has received notice, a judge of one of the superior courts may order that such entries and copies mentioned in the said notice shall not be admissible as evidence of the matters, transactions, and accounts recorded in such ledgers, day books, cash books, and other account books.

Judge may order that copies are not admissible.

Sec. 9. The fact of any such bank having duly made their return to the Commissioners of Inland Revenue may be proved in any legal proceedings by production of a copy of such return, verified as having been duly made by the affidavit in writing of one of the partners, or of the manager, or of one of the officers of such bank, or by the production of a copy of a newspaper purporting to contain a copy of such return, published in such newspaper by the said Commissioners of Inland Revenue.

Proof as to status of bank.

As to other points respecting the proof and effect of public and private documents, since they are of rare occurrence in criminal proceedings, it is thought more advisable to refer the reader to the general Treatises on the Law of Evidence, than to encumber this work with any notice of them.

(s) As to the meaning of this word, see sec. 1 of the Act in the appendix at the end of this vol.

(t) As to the meaning of legal proceedings, see sec. 1 of the Act, notated in the appendix.

(u) As to the meaning of 'the court,' see sec. 1 of the Act, in the appendix.

(v) As to a judge of one of the superior courts having power to order an inspection of such book, &c., see sec. 6 of the Act, in the appendix.

## CHAPTER THE FOURTH.

OF CONFESSIONS AND ADMISSIONS, p. 440.—OF STATEMENTS OF THE ACCUSED BEFORE MAGISTRATES, p. 499—AND OF DEPOSITIONS, p. 510.

## SEC. I.

*Of Confessions and Admissions.*

Confessions  
sufficient for  
conviction  
without proof  
*aliunde*.

A FREE and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true. (*a*)

A confession, if duly made, and satisfactorily proved, is sufficient

(*a*) Gilb. Ev. 123. Lambe's case, 2 Leach, 552, 4th edition. Mr. J. Blackstone, and Mr. J. Foster, entertained a different opinion. (See Post. 243.) The former in the fourth volume of his Commentaries, p. 357, says, in speaking of confessions made to persons not in authority as magistrates: 'Even in cases of felony at common law, they are the weakest and most suspicious of all testimony, very liable to be obtained by artifice, false hopes, promises of favour, or menaces, seldom remembered accurately, or reported with precision, and incapable in their nature of being disproved by other negative evidence.' A distinction may be properly made in the weight to be attached to confessions. If a confession be reduced into writing, either by the prisoner, or by some one else, and read over to him, and it be clearly shown that the confession was the spontaneous and voluntary act of the prisoner, such a confession would be entitled to great consideration. But if a confession were proved by a witness, and rested upon his capability of understanding what was said by the prisoner, his competency to remember the very words used, and his fidelity and accuracy in relating them to the jury, it ought to be received with very great caution. 'For,' as has been well observed (Greenleaf's Evid. 247), 'besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity

of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession. The zeal, too, which so generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition in the persons engaged in pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of persons necessarily called as witnesses in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection where in civil actions it would have been received.' The weighty observation of Mr. J. Foster is also to be kept in mind, that 'this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted.' Post. 243. Mr. B. Parke has on several occasions observed that 'too great weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say.' Earle v. Picken, 5 C. & P. 542, note. Rex v. Simons, C. & P. 540.

alone to warrant a conviction, without any corroborating evidence *aliunde* (b)

A confession is obviously not conclusive evidence against a prisoner, and when it involves matter of law as well as matter of fact, is to be received with more than usual caution. Thus on an indictment for setting fire to a ship with intent to defraud Greenfell and Eddy, being part-owners of the ship, a declaration of the prisoner that Greenfell and Eddy were part-owners was received in evidence; but it was objected that the bill of sale, under which Greenfell and Eddy claimed, was invalid in point of law; and it was held that, if by reason of the invalidity of the document evidencing the transfer of their shares, their legal title to them could not be established, the declaration of the prisoner could not be relied upon for that purpose. (c) So where, on an indictment for bigamy, the prisoner had confessed the first marriage, but it appeared that the marriage was void for want of the consent of the guardian of the woman, the prisoner was acquitted. (d)

Of the effect of confessions.

- (a) Confessions must be free and voluntary, p. 441.
- (b) What promises and inducements will exclude confessions, p. 442.
- (c) What threats and menaces will do so, p. 456.
- (d) Confessions made after former one, unduly obtained; or after inducements once made, p. 458.
- (e) As to persons whose inducements will exclude confessions, p. 463.
- (f) Confession elicited by questions, p. 472.
- (g) When prisoner's examination on oath evidence, p. 473.
- (h) Discoveries and acts done in consequence of confessions unduly obtained, p. 482.
- (i) Against whom confessions and statements evidence, p. 485.
- (j) Proof of confessions and statements—When onus on prosecutor to contradict same, p. 491.

(a) *Confessions must be free and voluntary.*

But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by *any sort* of threats or

Must be free and voluntary.

(b) *Wheeling's case*, in note, 1 Leach, 311. *Rex v. Eldridge*, R. & R. C. C. R. 440. *Rex v. Falkner*, *ibid.* 481. *Rex v. White and Langdon*, R. & R. 508. *Rex v. Tippit*, R. & R. 509. *Reg. v. Burton*, Dears. C. C. 282. *Rex v. Tuffs*, 5 C. & P. 167. In *Rex v. Edgar*, Monmouth Spr. Ass. 1831, MSS. C. S. G., the prisoner was indicted for obtaining money of a friendly society by false pretences; the rules of the society had not been enrolled, but the prisoner, who was a member of the society, had acted under them, and it was contended that he had thereby admitted their validity, and the position in the text was cited as a stronger decision; on which Patteson, J., said 'Could a man be convicted of murder on his confession alone, without any proof of the person being killed? I doubt whether he could.' In *Reg. v. Sutcliffe*, 4 Cox,

C. C. 270, where a robbery had been committed on a moonlight night, Cresswell, J., left the case to the jury on confessions of the prisoner, though the prosecutor swore the prisoner was not one of the men who robbed him. The remark on this case is that the prosecutor *might* be in error; the prisoner *must* know whether he was guilty or not. In the United States the prisoner's confession when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction. *Greenleaf's Evid.* 251, *Guild's case*, 5 Halst. 163, 185. *Long's case*, 1 Hayw. 524 (455). 2 Hawk. P. C. c. 46, s. 36.

(c) *Rex v. Philp*, R. & M. C. C. R. 263.

(d) *Anonymous*, 3 Stark. Ev. 894, note (n), *cos. Le Blanc*, J.

violence, nor obtained by *any* direct or implied promises, however slight, nor by the exertion of any improper influence, (*e*) because under such circumstances the party may have been influenced to say what is not true, and the supposed confession cannot safely be acted upon. (*f*)

The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed. (*g*) In determining, therefore, whether a confession be admissible or not, 'the only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one.' (*h*)

A confession can never be received in evidence, where the prisoner has been influenced by *any* threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration, if *any* degree of influence has been exerted. (*i*) It is a question for the court, and not for the jury, to decide whether, under the particular circumstances of the case, the confession be admissible. (*j*)

The general principle on which the decisions on this subject seem to have proceeded seems to be this: that if, under the circumstances, there be reasonable ground for presuming that the disclosure was made under the influence of any promise or threat of a temporal nature, the evidence ought not to be received. (*k*)

(*b*) *What promises and inducements will exclude confessions.*

Promises and  
inducements.

As to what shall be considered as a promise or inducement, saying to the prisoner that it would be better for him if he did confess is sufficient to exclude the confession. (*kk*) Where, on an indictment for robbery, a witness stated that he had said to one of

(*e*) It is a mistaken notion that evidence of confessions obtained by promises or threats are to be rejected from regard to public faith. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving the highest credit, because it is presumed to flow from the strongest sense of guilt; and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. Warickshall's case, Eyre and Nares, BB., 1 Leach, 263. Three men were tried and convicted for the murder of Mr. Harrison, of Campden, in Gloucestershire. One of them, under the promise of pardon, confessed himself guilty of the fact. The confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison

was alive. Ibid, note (*a*).

(*f*) Per Lord Campbell, C. J., Reg. v. Scott, D. & B. 47.

(*g*) Per Littledale, J., in Reg. v. Court, 7 C. & P. 486, *post*, p. 396. But in Reg. v. Baldry, 2 Den. C. C. 430, Lord Campbell, C. J., said, 'The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury.' But see Lord Campbell's dictum, Reg. v. Scott, *supra*.

(*h*) Per Coleridge, J., in Reg. v. Thomas, 7 C. & P. 345.

(*i*) 2 Stark. Ev. 36.

(*j*) Reg. v. Nute, *post*, p. 458. In Reg. v. Garner, 1 Den. C. C. 329, Erle, J., said, 'In every case it is for the judge to decide whether the words were used in such a manner, and under such circumstances, as to induce the prisoner to make a confession of guilt, whether such confession were true or no.'

(*k*) 2 Stark. Ev. 36.

(*kk*) 2 East, P. C. c. 16, s. 94, p. 659.

the prisoners, 'You had better split, and not suffer for all of them,' the statement of the prisoner was rejected. (l) One of a firm who employed the prisoner, having called him up into the private counting house of the firm, in the presence of another of the firm, and two officers of police, said, 'I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you, you will answer truthfully, so that if you have committed a fault, you may not add to it by stating what is untrue;' and having shown a letter to him, which he denied to have written, added, 'Take care; we know more than you think we know.' The prisoner thereupon made a confession. Held, that these words did not import an inducement or threat, and that evidence of the confession was admissible. (m)

If a person advise a prisoner to be sure to tell the truth, and he then makes a statement, such statement is admissible, on the ground that such advice cannot be supposed to induce the prisoner to confess that he is guilty of a crime of which he is really innocent. (n)

Advising a prisoner to be sure to tell the truth.

Upon an indictment for murder, it appeared that the prisoner, who was a boy of the age of fourteen, was taken into custody by Mr. Wragg, not a constable, and on the same night was in the parlour of the inn, to which he was taken; several persons, neighbours, but no constable, were in the room, and had been asking him questions about the children, whom he was charged with drowning. One Clark, who was present when Wragg took the prisoner up, and who was not a constable, stated, 'I told him to kneel down and tell the truth. Wragg took him into Adams' parlour, and began to question him how the children came to get into the pit; whether they fell in, or were put in; he said he should not tell anything about it. Wragg asked him if he would tell any one else, if he would go out of the parlour; the prisoner said nothing; Wragg then went out. I said to the prisoner, "Now kneel you down by the side of me, and tell me the truth." I believe this was the first thing. He did kneel down. I said, I was going to ask him a very serious question, and I hoped he would

(l) *Rex v. Thomas*, 6 C. & P. 353, Patteson, J. By such a statement as that made by the witness the prisoner *might* be induced to suppose that he would be more mercifully dealt with if he confessed, and that he might therefore be induced to confess himself guilty of an offence he never committed. See the Reporter's note, *ibid.* There are many similar cases to the above one: *Moody's case*, 2 Cawf. & D. C. C. Joy, 12. *Rex v. Walkley*, 6 C. & P. 175. *Rex v. Mills*, 6 C. & P. 146, and *MSS. C. S. G. Rex v. Shepherd*, 7 C. & P. 579. *R. v. Kingston*, 4 C. & P. 387.

(m) *R. v. Jarvis*, 37 L. J. M. C. 1, *et per Kelly*, C. B., 'As to the words "you had better" referred to in the argument, there are many cases in which these words have occurred, and they seem to have acquired a sort of technical mean-

ing, that they hold out an inducement or threat within the rule that excludes confessions, under such circumstances. It is sufficient to say that those words have not been used on this occasion; and that the words used appear to me to import advice given on moral grounds, and not to infringe upon the rule of law prohibiting a threat or inducement in these cases.'

(n) *R. v. Court*, 7 C. & P. 486, Little-dale, J. *R. v. Holmes*, 1 C. & K. 248; *R. v. Jarvis*, 37 L. J. M. C. 1, *per Kelly*, C. B.; *R. v. Sleeman*, Dears. C. C. 249, where the words were, 'Don't run your soul into more sin, but tell the truth,' and it was held there was no threat or inducement. An exhortation to speak the truth might not exclude a confession. See *per Erle, J.*, *R. v. Moore*, 2 Den. C. C. 522.

tell me the truth in the presence of the Almighty. I then said, "Did these children fall into the pit?" He said he pushed one in with one foot, and the other with the other, but not purposely.' Mr. Moulden asked him if he had any malice or revenge; he said, No. Subsequently to this, the son of the innkeeper stated that next day the prisoner said he would tell him all about it. He neither promised nor threatened him. The prisoner then made a statement to him, which was given in evidence. Other declarations also were given in evidence. An examination of the prisoner, who could not write, was put in; it began, 'W. Wild being cautioned, &c.,' and the evidence being read over to him, said, 'I can give no other account than I have already given,' &c. (o) The prisoner having been found guilty, upon a case reserved as to the admissibility of the evidence, the judges present were unanimous that the confession was strictly admissible, but they much disapproved of the mode in which it was obtained. (p) The mother of a little boy in custody on a charge of attempting to obstruct a railway train, said to him and another little boy in custody also on the same charge, in the presence of the mother of the latter and of the policeman, 'You had better, as good boys, tell the truth,' whereupon both boys confessed. Held, that the confession was admissible. (q)

Promise to be favourable, &c.

A confession induced by saying, 'I am in great distress about my irons; if you will tell me where they are, I will be favourable to you,' cannot be given in evidence. (r)

Where it appeared, on an indictment for larceny, that the prisoner, being in the custody of a constable, the latter said to the prosecutor, 'You must not use any threat or promise to the prisoner;' and immediately after this, the prosecutor said to the prisoner, 'I should be obliged to you if you would tell us what you know about it; if you will not, we, of course, can do nothing; I shall be glad if you will.' The confession was held inadmissible; Patteson, J., saying, 'I think this is a distinct promise; what could the prosecutor mean by saying, that if the prisoner would not tell, they could do nothing, but that if the prisoner did tell, they would do something for him?' (s)

(o) The statement is given at length in the report, as well as the statement made to the innkeeper's son, but they are omitted, as nothing turned upon their contents. C. S. G.

(p) *Rex v. Wild*, R. & M. C. C. R. 452. The conviction was affirmed, but the prisoner was transported for life. Lord Denman, C. J., Vaughan, J., Bolland, B., and Bosanquet, J., were not present at the meeting of the judges. The grounds of this decision are not stated in the report; but it should seem that the case may well be supported on the ground that the words addressed to the prisoner had no tendency whatever to induce him to make a false statement, but, on the contrary, were a most solemn adjuration to speak the truth. The decision seems fully warranted by the principle on which *Rex v. Gilham*, *post*, rests. The decision, however, could hardly be supported on the ground that the inducement was held

out by a person without authority, as it was held out by a person present at the apprehension, and who was acting in concurrence with the party who apprehended him, and they were keeping the prisoner in custody, no constable being present. C. S. G.

(q) *R. v. Reeve*, 41 L. J. M. C. 92. *R. v. Parker*, L. & C. 42. But see *per* Maule, J., in *R. v. Garner*, 1 Den. C. C. 329, *R. v. Baldry*, 2 Den. C. C. 430; *per* Pollock, C. B., *R. v. Bale*, 11 Cox, C. C. 686.

(r) *Cass's case*, 1 Leach, 293, note (a).

(s) *Rex v. Partridge*, 7 C. & P. 551. Dr. Greenleaf, *Evid.* 256, after citing this case, and *Guild's case*, *post*, p. 460, observes, 'It is extremely difficult to reconcile these and similar cases with the spirit of the rule as expounded by Eyre, C. B., in *Warickshall's case*, *ante*, p. 442; note (e); the difference is between confessions made voluntarily, and those

Where the prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but before the money was produced, said, 'he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;' upon which the prisoner took 11s. 6½*d.* out of his pocket, and said it was all he had left of it; a majority of the judges held that the evidence was inadmissible. (t) Where also an attorney, who was endeavouring to discover some burglars for the purpose of prosecution, said to the prisoner, who had gone to him for the purpose of making some statements relating to the burglary, 'I dare say you had a hand in it; you may as well tell me all about it;' it was held that this excluded a statement then made. (u) So where a prisoner being in custody said to the officer who had the charge of him, 'If you will give me a glass of gin I will tell you all about it,' and two glasses of gin were given to him, and he made a confession of his guilt; Best, J., considered it as very improperly obtained, and inadmissible in evidence. (v) But where a prisoner made a statement to a constable in whose custody he was, but he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so, and it was objected that what the prisoner said under such circumstances was not admissible; Coleridge, J., said, 'I am of opinion, that a statement being made by a prisoner while he was drunk, is not, therefore, inadmissible against him, and that, to render a confession inadmissible, it must either be obtained by hope or fear. This is matter of observation from me, upon the weight that ought to attach to this statement, when it is considered by the jury.' (w)

Confession obtained by gift of glass of gin.

Confession when drunk.

"forced from the mind by the flattery of hope, or by the torture of fear." If the party has made his own calculation of the advantages to be derived from confessing, and thereupon has confessed the crime, there is no reason to say that it is not a voluntary confession. It seems that in order to exclude a confession, the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the court, so far to overcome the mind of the prisoner as to render the confession unworthy of credit.' In *Rex v. Green*, 6 C. & P. 655, Tannton, J., said, 'I take it no man ever makes a confession without proposing to himself in his own mind some advantage to be derived from it,' *post*, p. 448.

(t) *Jones's case*, R. & R. 152, but see *Rex v. Griffin*, *ibid.* 151, *post*, p. 449.

(u) *Reg. v. Croydon*, 2 Cox, C. C. 67. *Rogers, Q.C.*, after consulting Platt, B.

(v) *Rex v. Sexton*, MS. Chetw. Burn. tit. *Confession*, p. 1086, Doyl. & Wms. The authority of this case has been questioned in several books. Deac. Cr. Law, 424, Rosc. Cr. Ev. 37, Joy, 17, and it seems very justly. In the first place the offer to confess was volunteered on the part of the prisoner; secondly, there was no promise or threat at all used by the constable, nor was the prisoner in any way led to believe that by confessing

he would escape from the charge, or be let out of custody; thirdly, there was no inducement to state anything but the truth. In 1 Burn's J. Doyl. & Wms. 1081, note (a), it is said, 'The authority of this decision seems doubtful; for it is not every hope of favour held out to a prisoner that will render a confession afterwards made inadmissible; the promise must have some reference to his escape from the charge.'

(w) *Rex v. Spilsbury*, 7 C. & P. 187. In a note to this case, 1 Phill. Ev. 465, it is observed, 'The facts of the case as reported do not warrant the marginal note, which is as follows:—"Sensible, if a constable give him (the prisoner) liquor to make him drunk, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the judge in his summing up." It is not to be inferred from the case that a confession—so immorally, not to say criminally, extorted—would be received.' The principle, however, on which the decision turned would seem to warrant the marginal note, as the mere giving liquor without any inducement in words could not operate as an inducement either by exciting hope of escape or fear of punishment. It is to be observed, also, that in all the cases where confessions have been excluded

Inducement to implicate another prisoner.

Telling prisoner what he says may be used in his favour.

Telling a prisoner that what he did say would be taken down and used against him will not exclude a statement.

If an inducement be held out to one prisoner to make a statement, which implicates another prisoner, such statement is inadmissible; for it can only be used as evidence against the prisoner who made it, and then it is evidence obtained by an inducement. (x)

A prisoner, when before a magistrate, was told by the magistrate's clerk not to say anything to prejudice himself, 'as what he said would be taken down, and would be used for him or against him at his trial.' Coleridge, J., 'This is an inducement, and it was held out by a person in authority. I am of opinion that the prisoner's statement cannot be given in evidence. I cannot conceive a more direct inducement to a man to make a confession than telling him that what he says may be used in his favour at the trial.' (y) So where the constable who apprehended the prisoner said to him, 'What you are charged with is a very heavy offence, and you must be very careful in making any statement to me or anybody else that may tend to injure you, but anything you can say in your defence we shall be ready to hear, and send to assist you;' a statement thereon made was rejected. (z) So where the constable told the prisoner, 'You are apprehended on a serious charge; take care that you do not say anything to injure yourself; but if you can say anything in your defence, we are willing to hear it, and to send to any person to assist you;' a statement thereon made was rejected. (a)

Where a police officer had told a prisoner that whatever he said would be used against him; it was held that a statement thereon made was admissible. (b) So where a police officer told the prisoner, before he made a statement, 'to be careful, it would be used against him on his trial if committed by the magistrates;' it was held that the statement was admissible. (c)

These cases were reviewed in the following case. Where, on an indictment for murder, a police constable said, 'I went to the prisoner's house. I saw the prisoner. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said *he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him.*' Objection was made that what the prisoner then said was inadmissible. Lord Campbell, C. J., thought that, although the caution of the constable differed from that directed by the 11 & 12 Vict. c. 42, s. 18, to be given by the justice to the prisoner in the word 'will' instead of 'may,' it did not amount to any promise or threat to induce the prisoner to confess; it could have no tendency to induce him to say anything untrue; and that in spite of it, if he did afterwards confess, the confession must be considered voluntary. His lordship, therefore, allowed the witness to give evidence of what the prisoner

there has been an anticipation of benefit or injury *after* the confessing or non-confessing. Where liquor is given the benefit (if it can be called any) is received already, and nothing further is in expectation. C. S. G.

(x) *Rex v. Enock*, 5 C. & P. 539.

(y) *Reg. v. Drew*, 8 C. & P. 140.

(z) *Reg. v. Morton*, 2 M. & Rob. 514,

Coleridge, J., approving of *Reg. v. Drew*.

(a) *Reg. v. Hornbrook*, 1 Cox, C. C. 54, Coleridge, J.

(b) *Reg. v. Chambers*, 3 Cox, C. C. 92, Rolfe, B.

(c) *Reg. v. Attwood*, 5 Cox, C. C. 322, Erle, J. But see *R. v. Toole*, 7 Cox, C. C. 244, Irish.



then said, which amounted to a confession of his guilt; and upon a case reserved, after argument on behalf of the prisoner, the judges were unanimously of opinion that the confession was properly received. Lord Campbell, C. J., 'I adhere to the opinion which I formed at the trial. The rule is, that *if there be any worldly advantage held out, or any harm threatened, the confession must be excluded*. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made a confession under a bias, and that therefore it would be better not to submit it to the jury.' Pollock, C. B., 'A simple caution to the accused to *tell the truth*, if he says anything, it has been decided not to be sufficient to prevent the statement made being given in evidence; (d) and although it may be put that where a person is told to tell the truth he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything, let it be true. But where the admonition to speak the truth has been coupled with any expression importing that it would be *better* for him to do so, it has been held that the confession was not receivable, the objectionable words being that *it would be better* to speak the truth, because they import that it would be better for him to say something. (e) The true distinction between the present case and a case of that kind is, that it is left to the prisoner as a matter of perfect indifference whether he should open his mouth or not.' (f)

After the prisoner had been committed on a charge of murder, a fellow-prisoner said to him, 'I wish you would tell me how you murdered the boy;—pray split.' The prisoner said 'Will you be upon your oath not to mention what I tell you?' The other prisoner went upon his oath, that he hoped, if he told, that he might never stir out of that place again. The prisoner then made a statement. It was held that this was not such an inducement as to render the statement inadmissible, and that, although such oaths were very wrong and wicked, still they were not binding; and that every person, except counsel and attorneys, were bound to reveal what they might have heard. (g)

Oath not to reveal a confession.

Where a person said to a prisoner that he might say what he had to say to him, for it should go no further, and the prisoner thereupon made a statement, it was held that it was receivable in evidence. (h)

Where a prisoner and his wife were both in custody on a charge of receiving bank notes, but in separate rooms, and a person said to him, 'I hope you will tell, because the prosecutrix can ill afford to lose the money;' and the constable said, 'If you will tell where the property is you shall see your wife;' Patteson, J., said, 'I think that this is not such an inducement as will exclude the evidence of what the prisoner said: it amounts only to this, that if he would tell where the money was he should see his wife.' And the statement made by the prisoner was received. (i)

Promise that prisoner should see his wife, &c.

(d) *Rex v. Court*, 7 C. & P. 486. *Reg. v. Holmes*, 1 C. & K. 248.

(e) *Reg. v. Garner*, 1 Den. C. C. 329.

(f) *Reg. v. Baldry*, 2 Den. C. C. 430. *Reg. v. Furlay*, and *Reg. v. Harris*, were cited and disapproved of in this case, and

can no longer be considered authorities.

(g) *Rex v. Shaw*, 6 C. & P. 372, *Patteson, J.*

(h) *R. v. Thomas*, 7 C. & P. 345.

(i) *R. v. Lloyd*, 6 C. & P. 393.

So where a constable told a prisoner that his father had been charged with murder. He had been previously cautioned not to criminate himself, as the witness would bring it all against him. The prisoner said he hoped no one would be charged with the murder but himself, and then made a confession. *Doherty, C. J.*, having conferred with *Torrens, J.*, admitted the confession, observing that, although such announcement was likely to act upon the feelings of the prisoner, he would not be warranted on that ground in refusing to receive it. (*j*) So where the prisoner was indicted for concealing the birth of her child, a medical witness said that he examined the prisoner in custody, and found that her breasts were full of milk, and asked her whether she had not recently had a child, and added that if she refused to tell he would examine her person more closely; the prisoner then said, 'It is unnecessary to examine me, for I had a child.' *Torrens, J.*, admitted this confession, on the ground that the witness was endeavouring to ascertain a fact within his own province, and not inconsistent with the prisoner's innocence, and that the declaration of the witness was not a threat within the rule which excludes confessions. (*k*)

Upon an indictment for housebreaking, it appeared that the prisoner being in the shop of the prosecutor, handcuffed, some recommendations to confess had been, in the absence of the prosecutor, made to him by the person who had been left in charge of the house; and the prisoner said, that if the handcuffs were taken off he would tell where he put the property. He had expressed doubts whether, if he told where the property was, he could rely on being leniently dealt with, and, after the prosecutor came in, he was told that they would do all they could for him. It was objected that the statement was inadmissible, as it was made under duress, and to deliver himself from the confinement. *Bosanquet, J.*, 'I do not think there is anything in the objection, but I will take a note of it.' *Taunton, J.*, 'I take it no man ever makes a confession voluntarily, without proposing to himself in his own mind some advantage to be derived from it.' The statement was received. (*l*)

It is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody: not even though some artifice has been used to draw him into that supposition. (*m*)

*Jacobs and Tarrant*, two apprentices, were indicted for stealing from their master, who, suspecting *Tarrant*, told him that if he did not confess he would send for a constable. *Jacobs* could hear what was said. *Tarrant* said he had robbed the prosecutor, and that *Jacobs* had robbed him too. *Jacobs* said, 'You are a liar; I have only taken one handkerchief.' It was held that the statement of *Jacobs* was admissible; for an inducement or threat offered to one person cannot affect the admissibility of a confession made by another, although that other be present when the inducement is offered. (*n*)

(*j*) *Nolan's case*, *Joy*, 16. 1 *Crawf. & Dix*, C. C. 74.

(*k*) *Cain's case*, *Joy*, 16. 1 *Crawf. & Dix*, C. C. 37.

(*l*) *Rex v. Green*, 2 *Off. & M.*

statement did not amount to a confession. and *Bosanquet, J.*, desired the jury to lay it out of their consideration.

(*m*) *Rex v. Burley*, 1 *Phill. Ev.* 406.

(*n*) *Reg. v. Jacobs*, 4 *Cox*, C. C. 54.

Confession made under mistaken supposition.

An inducement to one prisoner will not exclude a confession by another.

In a case (o) where the prisoner, while in gaol, asked the turnkey if he would put a letter into the post for him, and, after his promising to do so, the prisoner gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, gave it to the visiting magistrates of the gaol, who gave it to the prosecutor; Garrow, B., held that the letter so obtained was admissible in evidence, and said he remembered making an objection, when at the bar, to evidence under the same circumstances before Gould, J., who overruled it.

Letter from the prisoner in gaol.

A confession made by the prisoner with a view and under the hope of being thereby permitted to turn king's evidence, has been held inadmissible. (p) On an indictment for murder, it appeared that the prisoner was taken into custody on the charge on the 2nd of December, and that on the 11th he made certain statements, which were sought to be given in evidence. To prove one of these statements, a policeman was called, who said that he held out no inducement to the prisoner to make any statement, nor did he know that any one else had done so to the 11th of December, when the statement was made; but on the 6th of December he knew that a reward of 100*l.* had been offered by the government, accompanied by a statement that the Secretary of State would recommend an accomplice, not being the person who actually committed the murder, for a pardon, but the witness could not state that this had come to the knowledge of the prisoner; and Cresswell, J., allowed this statement to be given in evidence. In a later part of the same case a policeman stated, that soon after the prisoner had been taken into custody, and before the 6th of December, the prisoner requested that he would let him know if any reward should be offered, or any papers published concerning the murder, and that he would bring any such papers to him as soon as they were printed. On the 6th of December, it was generally known that the Secretary of State had offered a reward and a promise of free pardon to any of the offenders, except such as had struck the blow, and on the 13th the witness gave the prisoner one of the printed handbills, which offered 100*l.* reward to any person who should give such information as should lead to the discovery and conviction of the murderers, and 'a pardon to an accomplice, not being the person who actually committed the murder, who shall give such information as shall lead to the same result.' Cresswell, J., after consulting Patteson, J., held that a statement made by the prisoner to the witness on the 11th of December was receivable. In a still later part of the same case, it appeared that on the evening of the 10th of December, the prisoner said that he saw no reason why he should suffer for the crime of another, and as government had offered a free pardon to any one of the parties concerned, who had not struck the blow, he would tell all he knew about the matter. Cresswell, J., 'It now appears, with sufficient clearness, that the prisoner in making the statements

Confession with a view to being admitted as a witness, and receiving a pardon.

Statements made after a reward and pardon offered by the Secretary of State rejected, it appearing that they were produced thereby.

The Common Serjeant after consulting Erle, J. *R. v. Bate*, 11 Cox, C. C. 686.

(o) *Rex v. Derrington*, 2 C. & P. 418, Garrow, B.

(p) Hall's case, in note to *Lange v. Leeson*, 2 Leach, 559. But where a person

had been admitted king's evidence, and confessed, and upon the trial of his accomplices refused to give evidence, he was convicted upon his own confession.

*Rex v. Barker*, 11 Cox, C. C. 69.

ascribed to him was influenced by the hope of pardon held out by authorized parties. I shall, therefore, reject the evidence of all statements made by him after the evening of the 10th of December, and expunge from my notes such as have already been given in evidence.' (q)

Confession by a prisoner after he had heard of a reward and pardon, and after he had been cautioned, held admissible.

Upon an indictment for murder, it appeared that the prisoner sent to the chaplain of the gaol, and said he thought it was very hard that some of the prisoners should have their lives taken away wrongfully, and asked the chaplain if any magistrate would come that day, as he wished to see a magistrate to make a statement respecting the charge; and then said, 'Has any proclamation been made, or any offer of pardon?' The chaplain said proclamation had been made some time, and an offer of pardon. The prisoner then said if any person should make known the circumstances, it would be impossible for him to go back to Pershore. The chaplain said that any person who made such a statement would probably not think of going back to Pershore, and that if he made a statement the chaplain hoped that he would understand that he could offer him no inducement, as it must be his own free and voluntary act. When the prisoner asked if there was a proclamation, there was something said that the reward would enable a person to go elsewhere. A magistrate came in about three-quarters of an hour, and what passed between him and the prisoner, before the latter made a statement, was reduced to writing as follows:—'The voluntary information and confession, &c., 'who saith, in answer to questions put by the said magistrate, I wish to make a statement of what I know. I have told the chaplain so, and desired him to send for a magistrate. No person has made any promise or held out any inducement; what I have said to the chaplain, and what I am about now to say, is my own free and voluntary act and desire.' The said magistrate having read over to the said prisoner the foregoing statement, informed him he was at liberty to say anything he might wish, and that it would be the said magistrate's duty as a magistrate to take it down in writing. The said prisoner voluntarily saith as follows [here followed the statement.] It was urged that this statement ought not to be admitted, as it was manifest that the motive which induced the prisoner to make it was the offer of pardon. It was clear he made it to save himself by means of the pardon. Pollock, C. B., 'I collect from the decision in *Reg. v. Boswell*, (r) that before a statement can be excluded on the ground that it was made in the hope of a pardon, it must appear that that motive was operating on the prisoner's mind, and in that case, up to the moment when that was shown, my brothers Patteson and Cresswell held the statements of the prisoner to be receivable, though the prisoner knew of the reward and the promise of a pardon having been offered by the Secretary of State; but when it appeared that Boswell had made the communication, stating "he saw no reason why he should suffer for the crime of another, and that, as government had offered a free pardon to any of the parties concerned, who had not struck the blow, he would tell all about the matter," it was held that the statement was inadmissible,

as it appeared that the prisoner was influenced by the hope of pardon held out by authorized parties. In the present case the chaplain said to the prisoner, after the pardon had been alluded to, that he hoped he would understand that he, the chaplain, could offer him no inducement; it must be his own free and voluntary act, and what the magistrate said to him is very nearly to the same effect. I think that the statement of the prisoner must be received.' (s)

Moore and Blackburn were tried for a murder. The chief constable had received three anonymous letters; No. 1 on the 29th of October, No. 2 on the 3rd of November, and No. 3 on the 8th of that month; on the 12th Moore was examined as a witness against Blackburn before the magistrates; and, on his leaving, the chief constable told him that he was not satisfied with the way he had given his evidence; Moore said that he had more to state, and was desired to put it on paper, and the next day a paper was produced, which Moore said he had written. The chief constable then said, 'I arrest you as the writer of several anonymous letters, showing a guilty knowledge of the murder.' Moore said he had written the letters Nos. 1 and 2, and the chief constable believed No. 3 to be in his handwriting. A large reward had been offered to anyone giving private information of the murder, and a reward and free pardon by government for any accomplice not the actual murderer; and a handbill had been circulated, dated Nov. 4, stating these rewards and pardon. Moore had received a shilling a day by the direction of the chief constable whilst he was a witness, as he stated he was starving. The chief constable told Moore repeatedly, when he was treated as a witness, that he must speak the truth; but he never offered him any inducement to make any statement. It was held that these letters and statements were admissible; they were not confessions, but merely statements made to get others implicated. The governor of the gaol, from notes made at the time, afterwards deposed to a statement made by Moore in the magistrate's room at the gaol, four days after he was charged with the murder; at this time a printed copy of the handbill offering the rewards and pardon was hanging up in the room, and the contents were known to the prisoner, who frequently, both before and after this statement, asked the governor whether he thought he (the prisoner) could give evidence, but he never said that he made the statement in that expectation, or in hope of getting the reward, and the gaoler on all occasions told him, before he said anything, that his statements would be used against him. Talfourd, J., received the statement at the time; but the following morning stated that he had consulted Williams, J., and, upon mature consideration, they considered that all the statements were admissible, with the exception of that made to the gaoler. As it appeared that at the time it was made the handbill was in the room, and the prisoner had the notion that he would be admitted as a witness for the Crown, they were of opinion, on mature consideration, that this statement was inadmissible, and he should therefore expunge it from his notes. (t)

Letters admitted after an offer of a reward and pardon, but a statement rejected; as the latter, but not the former, seemed to have been caused by the reward and pardon.

Confession by one prisoner after another had been admitted queen's evidence and after a caution from a magistrate.

The prisoner, who was indicted with several others for burglary, sent for a magistrate to tell him he had something to communicate to him. The magistrate acted at the interview with great caution, and warned the prisoner not to say anything that would criminate himself, as what he said would be taken down in writing, and made use of against him on his trial. The prisoner replied he did not care, as he knew that the witness knew all. Upon cross-examination, it appeared that the prisoner had been confined, after his arrest, in the same cell with another person, charged with the same crime, who had confessed and been admitted queen's evidence; the prisoner was aware of this, and it was to that he alluded when he said that he knew the witness knew all, and that it was from the statement made by the person who had been admitted queen's evidence that the prisoner was examined, and his confession taken down. It was insisted that, under these circumstances, the confession was not admissible, as the caution given by the magistrate did not appear to have had the effect of removing from the prisoner's mind all the influences which would have invalidated the confession, and that there was a reasonable cause to lead the prisoner to believe that if he made a confession he would be put in the same situation with the other person who had done so. Crampton, J., received the confession, observing that the magistrate stated that, as far as he knew, the prisoner came forward voluntarily; that a mere formal caution from a magistrate would not be sufficient to set up a confession, if it appeared that such confession was made under *the distinct impression of a previous promise or threat*, but that it did not appear that there was any previous inducement whatever. If there were any threats made use of before, or any promises held out, the distinct caution given by the magistrate was sufficient to obviate them. It was in effect telling the prisoner that he would get no benefit from his confession, and that he should consequently dismiss from his mind all expectation of getting any, if any such he had. (u)

An inducement as to one crime will not exclude a confession as to another crime.

The prisoner had been in the custody of several constables, one after another, and it was suggested on his behalf that one of them had improperly induced him to confess, and this constable was called, and stated that the prisoner was in his custody on another charge, and was not suspected at that time of the offence for which he was on his trial, and that he made a statement. It was submitted that if a promise was held out to him, it was immaterial what the charge was. Littledale, J., 'I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge.' The confession was admitted. (v)

Unless they are parts of

But where several felonies form part of the same transaction,

(u) Berigan's case, Joy, 27. 1 Ir. Circ. Rep. 177. In this case there were similar confessions made by all the prisoners, under circumstances precisely similar, and they were all admitted. 'It is not improbable,' observes Mr. Joy, 'that in this case the prisoner was induced to make the confession by what

his fellow-prisoner had done, and by his having been admitted queen's evidence, but no promise, threat, or inducement was held out by any person in authority calculated to make his confession untrue. Joy, 28.

(v) Rex v. Warner and Morgan, Gloucester Spr. Ass. 1832. MSS. C. S. G.

an inducement held out as to one will exclude a statement as to another. (*w*)

Upon an indictment for murder, it appeared that the prisoner and the deceased had been in the service of Mrs. Cox, at Bath. The deceased was murdered in the night of the 26th of January, and the prisoner was apprehended on the 30th of that month, and some articles belonging to Mrs. Cox afterwards found in a room hired by him. When in gaol, the prisoner had the Bible and the *Whole Duty of Man* by him; the gaoler pointed out several passages for him to read in the Prayer Book, particularly the opening sentences of the service, and told him if he wished to have a spiritual adviser he would endeavour to get him one; and after some conversation the prisoner expressed a wish to have the chaplain of the gaol. The chaplain went to the gaol and asked the prisoner why he sent to him; the prisoner answered, to read and pray with him, as he could not do it himself, or make use of the books which were lying before him, which were the Bible, Prayer Book, and *Whole Duty of Man*. The prisoner said he knew he was a sinner, and should soon die. The chaplain asked him how he knew it; he replied, he had been told at the Hall he should be hanged for taking the goods of his mistress; and he then admitted that he had purloined a few things from her. The chaplain saw he was in a very perturbed and distressed state of mind, and asked him if there was not something still more heavy on his conscience; he said he knew he was a sinner as other men, and he knew he was suspected of the unhappy murder. The chaplain told him, if he was innocent to maintain his innocence; but if not, his own heart would tell him. The chaplain, as the minister of God, thought it was his duty to warn him not to add sin to sin, by attempting to dissemble with God. The chaplain then asked him, as he confessed himself a sinner, and as he thought he should soon die, whether he would not wish to repent of his sins; he answered in the affirmative. The chaplain then explained to him what he considered to be the nature of true repentance; and, amongst other things, that it was not a mere acknowledgment of sin, but a deep search into ourselves, and by the purity of the Gospel, whenever we found ourselves deep defaulters, to confess the same before God, with a deep contrition on our part for having violated the law of God. The chaplain told him, that before God it would be better for him to confess his sins. The chaplain also told him, that, next to confessing his sins before God, another most important part of the duty of repentance was to repair, by all possible means in his power, every injury of whatsoever nature he had done to his fellow-creatures; he enlarged very considerably on his repairing the injuries he had done his fellow-creatures, as forming a branch of true repentance; and he said he might say, and repairing any injury done to the laws of his country. The chaplain stated that the prisoner was then extremely agitated; he read to him part of the Communion Service, commenting upon it as he went along. He thought at one time that the prisoner was on the point of making some immediate communication to him, and he asked him if he should send for Mr. Bourne (the gaoler),

the same transaction.

A confession made in consequence of persuasion by a clergyman, not with any view of temporal benefit, is admissible.

meaning it with a view of the prisoner making a communication to Bourne, because he considered he had made a great impression on the prisoner. The chaplain stated the prisoner's agitation and perturbed state of mind during the interview was so great that he could not help being aware that the prisoner had something pressing on his mind; and the chaplain said while that was the case he could tell the prisoner, and the prisoner would feel, that no services of his would afford him, what he wished they should do, real comfort; telling him also he must be aware that he, as a minister of God, had but one object in view, to bring him to a state of true repentance; and that he could not but himself feel sensible that he was more concerned in the dreadful deed than he had admitted; that he did not wish him to confess to him, but to bear in mind the subject on which he had talked to him and read to him. The prisoner was evidently so worked upon by what had been said, that the chaplain could not but observe it to him, and asked him whether his conscience did not bear witness to the truth of what he had advanced. The chaplain soon after left him, the prisoner having expressed a wish to see him again. He then went and reported to the magistrates what had passed between them; and having recovered himself a little from the agitation he was in from so painful an interview, went to the prisoner again a little before three on the same day, and resumed the tenor of his conversation upon repentance, and confessing his sins before God, and repairing, by every possible means, any injury he had done to his fellow-creatures. As the prisoner had himself alluded to the murder, the chaplain entreated him, if he knew himself guilty, to avail himself, by the means of general repentance and faith in Christ, to be reconciled with God. At one time, during this interview, the chaplain saw so evident an impression made on his mind, that he could not but tell him, his fear, which he had expressed to the prisoner in the morning, respecting his participation in the dreadful deed, was fully confirmed; and that while he was in that state of mind, he (the chaplain) could not afford him the consolation by prayer, which it was his earnest wish to do, and so that his prayers could be of any avail to him; and he soon after left the prisoner. The first interview lasted about two hours, and the second about an hour and a quarter, and during these interviews the chaplain enlarged upon the topics mentioned to the prisoner. The chaplain said he could almost take upon himself to say, that he always used the terms, 'confessing his sins before God;' but he afterwards said that he could not say, that he mentioned 'before God' every time he used the word 'confessing.' After the second interview, the gaoler saw the prisoner, and told the prisoner what had passed between him, the gaoler, and the prisoner's wife; and he also told the prisoner, that he was perfectly satisfied that what he, the gaoler, said in the morning was correct. The prisoner then said he would tell the gaoler all about it. The gaoler said to him, 'Don't tell me anything but what you would wish the mayor and magistrates to know, for whatever you tell me I must inform them of.' The prisoner then related to the gaoler the particulars of the murder, and the way in which he had committed it. The gaoler then said to him, 'Now I shall tell all this to the mayor and magistrates.' The

First caution.

First confession to the gaoler.



prisoner then said, 'That is what I wish ;' he said he had endeavoured to make up his mind to confess before ; he had a great mind on Monday. He then requested the mayor should come and hear what he had to say : and particularly wished to see the clergyman again. The next morning (Saturday) the gaoler saw him again, and read to him two prayers and a psalm : he said he felt himself a good deal easier in his mind. The mayor of Bath and town clerk came about ten o'clock. The prisoner, before he saw them, told the gaoler that some part of what he had stated the night before was not correct, as to what part of the house he met the deceased in when he first struck her, and he said it was in another part of the house. When the mayor saw the prisoner in the gaoler's room, he said, 'I am come to see you, as I understand you wish to make some communication to me.' The mayor then said to him, 'Before you say anything, I think it necessary to apprise you, as I have done several times during your examination, that it will probably be given in evidence against you. You are, therefore, to use your own discretion, and say little or nothing, as you may think best ; and if you have changed your mind since you sent to me, and do not choose to say anything, I will retire, and shall not feel at all angry with you for having brought me down unnecessarily.' The prisoner said something ; what he said was taken down in writing, in his own words ; it was read over to him by the town clerk, and the clerk asked him if he had any objection to sign it : he said he had not any, but his hand shook so much he could not write his name, but it was all true. The mayor then signed the examination, but it was not signed by the prisoner. This examination of the prisoner was read ; and it contained a confession of his having committed the murder, and the circumstances attending it. It appeared that the prisoner had undergone five or six examinations, including the coroner's inquest. In the course of the same morning, after the mayor was gone, one of the mayor's officers saw the prisoner, and in answer to a question how he was, the prisoner told him he was better since he had eased his mind ; and in the conversation they had, he told the officer that he had committed the murder, and related some of the particulars. The next morning (Sunday) the prisoner was taken from Bath to the county gaol by another of the mayor's officers, and in answer to an inquiry how he felt, he said he felt a good deal better since he had relieved his mind ; and in the course of their journey he told this last-mentioned officer that he had committed the murder, and stated some of the particulars. It was contended on the part of the prosecution that, even supposing the confession made to Bourne, the gaoler at Bath, immediately after the chaplain's interview with the prisoner, were not receivable in evidence, still that the confession made to the mayor was receivable, inasmuch as the mayor cautioned him against saying anything, unless he thought it right, and that what he said would probably be given in evidence against him. But Littledale, J., thought that, after what the chaplain had said to him, nothing that the mayor said could do away the effect which the chaplain had produced in his mind, and that it differed from those cases where a confession having been made under circumstances which prevented its being received in evidence, if a magistrate has cau-

Second caution.

Second confession to the mayor.

Third confession to the mayor's officer.

Fourth confession to the mayor's officer.

Opinion of Littledale, J.

tioned a prisoner not to say anything against himself, a subsequent confession made before a magistrate has been admitted in evidence. The learned judge received the confessions in evidence, and the prisoner was found guilty. But the point was reserved for the consideration of the judges; before whom it was argued. (y) The judges were of opinion that the confessions had been properly received, and that the conviction was right; upon the ground, it is understood, that there were no temporal hopes of benefit or forgiveness held out, and that such hopes, if referrible merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded. (z)

(c) *What Threats and Menaces will exclude a Confession.*

Threats and  
menaces.

As to what shall be considered as a threat, saying to a prisoner that it would be worse for him if he did not confess, is sufficient to exclude a confession. (a) So a confession induced by saying, 'Unless you give me a more satisfactory account, I will take you before a magistrate,' or (b) by saying, 'that unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face,' (c) cannot be given in evidence. So where a prosecutrix said to her servant girl, who was in custody on a charge of administering poison to her, 'Jane, now you see the effects of your wickedness; you will be to go from here to-morrow morning to Stourbridge to the magistrates, and not return again.' The girl answered, 'Sooner than I will go from here or anywhere else, I will tell the truth;' and the prosecutrix said, 'That is what I want,' and the prisoner then made a statement; it was held that the statement was inadmissible, because it was made to prevent her being taken before the magistrates. (d)

Threatening  
to apprehend  
a boy on a  
charge of  
arson.

A boy, between eight and nine years old, was thus questioned by a policeman: 'Have you ever been to school?' He said 'Yes.' 'Do you know what will become of you if you tell a falsehood?' 'Yes; I shall go to hell.' 'Do you think God knows everything that is done?' 'Yes.' 'Do you think he knows who set fire to the haystack?' The boy did not answer, but began to cry. The

(y) The following authorities were cited: *Rex v. Radford*, tried at Exeter Summer Assizes, 1823, where a clergyman had prevailed on the prisoner to confess a murder, by dwelling on the heinousness of the crime, and the denunciations of Scripture against it, without giving him any caution that it would be used in evidence against him, and Best, C. J., refused to allow the clergyman to state the confession; saying that he thought it dangerous after the confidence thus created, which would throw the prisoner off his guard, and the impression thus produced, to allow what he then said to be given in evidence against him. But it is said that this case was not determined on this ground; but that Best, C. J., thought that it was improper in the clergyman to vio-

late the confidence reposed in him by the prisoner, and expressed a strong opinion to that effect; and as the evidence was not wanted for the Crown, it was not pressed, and the prisoner was convicted without it. *Rex v. Sparkes*, cited Peake, N. P. R. 78. *Williams v. Williams*, 1 Hagg. 304.

(z) *Rex v. Gilham*, R. & M. C. C. R. 136.

(a) 2 East, P. C. c. 16, s. 94, p. 659. *R. v. Coley*, 10 Cox, C. C. 536.

(b) *Thompson's case*, 1 Leach, 291.

(c) *Rex v. Parratt*, 4 C. & P. 570, *Alderson, J.*

(d) *Rex v. Griffiths*, MSS. C. S. G. Worcester Sum. Ass. 1832, *Bosanquet, J.* S. C. as *Rex v. Richards*, 5 C. & P. 318. See this case more fully, *post*, p. 463.

policeman then asked whether he could give any information about the fire, and told him, before he made any statement, he should apprehend him upon a charge of setting fire to Mr. Wright's ricks. After that the boy made a statement. Cresswell, J., after consulting Williams, J., said, 'It seems to us both too hazardous to admit this evidence. It is impossible not to say that what passed may have acted upon the boy's mind as a threat.' (e)

Where the prisoner was indicted for sheep-stealing, and, prior to his examination before the magistrate, his wife volunteered a confession of the particulars of the robbery; and on the prisoner being brought up for examination, the magistrate told him that his wife had already confessed the whole, and that there was quite case enough against him to send a bill before a grand jury, and then asked him what he had to say. The prisoner immediately confessed his guilt, and stated several facts, which had been previously deposed to by his wife. It was objected that this confession could not be received, inasmuch as the magistrate's address to the prisoner when he was brought before him to be examined was in the nature of a menace. But Parke, J., overruled the objection, saying he considered it rather as a caution. (f)

Words not amounting to a menace.

The words, 'I must know more about it,' said by a police constable to a prisoner in the course of a conversation between them respecting the subject matter of the charge, immediately before apprehension, were held not to exclude an admission. (g)

Prosecutrix lost her purse, containing 1*l.* 4*s.*, in a market, and asked the prisoner, who had been standing near her, whether he had seen the purse or seen anyone pick it up. He replied that he had not. She, however, suspecting that he had robbed her, gave information to the police. A policeman a short time after went in search of prisoner, and having found him, told him that the prosecutrix had lost her purse, and that it was supposed that he had picked it up, and added, 'Now is the time for you to take it back to her.' He denied having it, and went with the policeman. As they walked along he commenced making a statement, but the policeman told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about six hundred yards, some conversation took place, and the prisoner was searched, and on a half a sovereign being found, the prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, 'Now is the time to take it back to her,' and the prisoner's statement, 'That he would make it all up to her.' Held, that there was no inducement held out to the prisoner, and that his statement or confession that he would make it all up to her was admissible in evidence against him. (h)

If the words used to a prisoner be such that he might consider them as a threat, a confession is not admissible. The prisoner being in custody on a charge of arson, he was told that 'he ought to tell whatever was the truth, but he must be very careful, as he was sure to be committed,' on which he made a statement. Taun-

Where the words used are ambiguous.

(e) Reg. v. Day, 2 Cox, C. C. 209. v. Long, 6 C. & P. 179.

Rex v. Griffiths, *supra*, and Reg. v. Hearn,

(g) R. v. Reason, 12 Cox, C. C. 228.

C. & M. 109, were cited.

(h) R. v. Jones, 12 Cox, C. C. 241.

(f) Wright's case, 1 Lew. 48. See R.

ton, J., doubted whether the words used might not be construed as a threat, and having consulted Littledale, J., said, 'We think as the words were so ambiguous that they might be considered by the prisoner as a threat, the evidence ought not to be given.' (i)

Under false  
imprisonment.

Where a prisoner had been taken into custody by a constable without a warrant, and detained by him in durance for four days, and during his confinement a confession was obtained under certain promises, and on the part of the prosecution it was attempted to be shown that the confession was voluntary, and not made under such promises; Holroyd, J., said, 'Even if that were so, the fact of its having been made while in *unlawful custody* renders it unavailing;' and there being no sufficient evidence without it, he directed an acquittal. (k)

(d) *Confession made after former one unduly obtained, or after Inducements once made.*

Confessions  
made after  
one unduly ob-  
tained.

If a confession has been obtained from the prisoner by undue means, any statement afterwards made by him under the influence of that confession cannot be admitted as evidence.

Confession  
after induce-  
ment once  
made.

Where an inducement which would exclude a confession has been held out to a prisoner, there ought to be clear evidence to show that the impression caused by it has been removed, before a subsequent confession made at a different time is admitted as evidence. (l) The cases upon this subject are conflicting. But certain general rules and principles can be deduced from the following cases. The question whether the confessions can be received in evidence is for the judge, and each case must be determined upon its own facts.

In the case of *Rex v. Nute*, (m) the prisoner was suspected of setting fire to an outhouse; her mistress pressed her to confess, and told her, among other things, if she would repent and confess God would forgive her, but she concealed from her that she would not forgive her herself: she confessed. The next day, another person, in her mistress's sight, though out of her hearing, told her her mistress said she had confessed, and drew from her a second confession. Lord Eldon, C. J., allowed the confessions in evidence, and the prisoner was convicted. The jury, on having the confessions put to them, said they thought the first confession made under a hope of favour here, and the second under the influence of having made the first. On a case reserved, the judges held that these points were not for the jury, but if Lord Eldon agreed with the jury, which he did, the confessions were not receivable; but many of them thought the expressions not calculated to raise hope of favour here, and, if not, the confessions were evidence. So in *Rex v. Sexton*, (n) a confession had been improperly obtained by giving

(i) *Rex v. Williams*, Gloucester Spr. Ass. 1832, MSS. C. S. G.

(k) *Ackroyd's case*, 1 Lew. 49. This decision has been questioned, and it has been observed that 'if the prisoner were to believe the apprehension unlawful, that would make him careful not to disclose anything against himself; if he should suppose it lawful, that also would make

him careful not to make his situation worse, nor in any respect to prejudice himself.' 1 Phill. Ev. 407, and see *Rex v. Thornton*, R. & M. C. C. R. 27.

(l) Sec 2 East, P. C. 658. *Bell's case*, Joy, 71.

(m) 1 Burn. J., Doyl. & Wms. 1086.

(n) 1 Burn. J., Doyl. & Wms., 1086.

the prisoner two glasses of gin: the officer to whom it had been made read it over to the prisoner before the committing magistrate, who told the prisoner the offence imputed to him affected his life, and a confession might do him harm. The prisoner said, that what had been read to him was the truth, and signed the paper. Best, J., considered the second confession, as well as the first, inadmissible: and said, that had the magistrate known the officer had given the prisoner gin, he would, no doubt, have told the prisoner that what he had already said could not be given in evidence against him, and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would be evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate.

Upon an indictment for murder it appeared that the prisoner worked at a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own; and added, 'There is no doubt thou wilt be found guilty; it will be better for you if you will confess.' A constable then came in, and said to the overlooker, in a tone loud enough for the prisoner to hear, 'Robert, do not make him any promises.' The prisoner then made a confession. Patteson, J., 'That will not do. The constable ought to have done something to remove the impression from the prisoner's mind.' The overlooker, in about ten minutes, delivered the prisoner to the constable of the township. The constable stated, that when he received the prisoner, the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. That he took the prisoner to his house, and there said, 'I believe Sherrington has murdered a man in a brutal manner. That the wife and brother of the prisoner were there, and said to the prisoner, 'What made thee go near the cabin?' That the prisoner in answer made a statement similar in effect to the one he had made before. That he used neither promise nor threat to induce the prisoner to say anything. But that he did not caution him. That it was not more than five minutes after he received the prisoner into his charge that the prisoner made the statement. That he was not aware that the overlooker had held out any inducement. That the overlooker was not present when the statement was made. For the prisoner it was submitted that the second confession must be taken to have been made under the same influence as the first. Patteson, J., 'There ought to be strong evidence to show that the impression under which the first confession was made was afterwards removed, before the second confession can be received. I am of opinion, in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination;' and the statement was rejected. (o)

Where one confession has been obtained by an inducement, there ought to be strong evidence to show that the impression under which it was made was removed before a subsequent confession can be received.

(o) Sherrington's case, 2 Lew. 123. Meynell's case, 2 Lew. 122; R. v. Hewett, C. & M. 534.

Where the prisoner had been induced by promises of favour to make a confession, which was for that cause excluded, but about five months afterwards, and after having been solemnly warned by two magistrates that he must expect death, and prepare to meet it, he again made a full confession, this latter confession was admitted in evidence. (*p*) In this case, upon much consideration the rule was stated to be that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, if the court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. (*q*) In the absence of any such circumstances the influence of the motives, proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected. (*r*)

Confessions made after the effect of inducements have been done away are admissible.

Although such improper inducements may have been held out to a prisoner as would exclude a confession made under their influence, yet if the court, taking into consideration all the circumstances of the case, should be of opinion that at the time a confession was made such inducements had ceased to operate upon the mind of the prisoner, such confession will be admissible. In determining whether an inducement has ceased to operate, it will be material to consider the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it, the time which has intervened between the inducement and the confession, and whether there has been any caution given, and if so, whether that caution has been given generally, or expressly and specifically with reference to the inducement held out. Thus where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable that it would be better for him to confess, but that, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances before the magistrate was held to be clearly admissible. (*s*)

Where it appeared that a constable told the prisoner he might do himself some good by confessing; and the prisoner afterwards asked the magistrate if it would benefit him to confess; on which the magistrate said he could not say it would, and the prisoner then declined confessing; but afterwards, in his way to prison, he made a confession to another constable; and he confessed again in prison to another magistrate; the judges were unanimous in holding that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. (*t*) Nor is it any objection to a confession made before a magistrate, that the

(*p*) Guild's case, 5 Halst. 166, 168, as stated, Greenl. Ev. 257.

(*q*) Greenl. Ev. 257, citing Guild's case, 5 Halst. 180.

(*r*) Greenl. Ev. 257, citing Roberts'

case, 1 Devereux R. 259, 264.

(*s*) Rex v. Lingate, 1 Phill. Ev. 410, Bayley, J. See R. v. Howes, 6 C. & P. 404, Lord Denman, C. J.

(*t*) Rex v. Rosier, 1 Phill. Ev. 411.

prosecutor who was present first desired the prisoner to speak the truth, and suggested that he had better speak out, provided the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but to say what he thought proper. (u)

Where the prisoner has been duly cautioned by the magistrate, in pursuance of 11 & 12 Vict. c. 42, s. 18, *post*, anything said by him thereupon is admissible in evidence against him, although there may have been a previous promise or threat held out to him to induce him to confess. (v) That the caution has been given requires no further proof than the fact of its appearing to have been so given on the face of the prisoner's statement, returned together with the depositions. (v)

Where prisoner has been duly cautioned by magistrate.

Where before the above Act it appeared that, before a prisoner was asked what he had to say, he was particularly cautioned by the magistrate not to say anything that would injure himself, for whatever he said would be taken down, and given in evidence against him; but it also appeared that a constable, who had previously induced the prisoner to make a confession to him by telling him it would be better to confess, had been examined before the magistrate, and in his examination had stated that he had told the prisoner that it would be better to confess, and had also stated all the prisoner had said to him in consequence; all which had been taken down, and read over to the prisoner before he made his statement; Littledale, J., refused to allow the statement to be given in evidence, as the caution given by the magistrate was not sufficient to obviate the effect of the inducement used by the constable. (x) But where a constable proved that he had given the prisoner a handbill, offering a reward to any accomplice who would give information on the subject of the robbery, and the handbill was read over to the prisoner, who made a statement, which the constable took in writing; (y) when the prisoner was examined before the magistrate this statement was incorporated into the constable's deposition. The prisoner was then told that anything he said would be taken down, and might be used against him, and the prisoner said that the statement to the constable was quite true. It was objected that the last statement would not make the statement to which it referred evidence. The recognition of an inadmissible statement could not make it admissible. Tindal, C. J., 'The impression made by the constable was afterwards removed by the caution given by the committing magistrate; and then the prisoner adopts his former statement. It is just the same as if the prisoner had repeated it or written it down *de novo* after the caution, and then its admissibility could not have been questioned.' (z) And where, before

(u) *Rex v. Edwards*, 1 Phill. Ev. 411.

(v) *R. v. Bate*, 11 Cox, 686.

(x) *Rex v. Smith*, Worcester Spr. Ass. 1830, MSS. C. S. G. It is to be observed, that not only was there no express caution given in this case not to rely on the promise made, but that by receiving the previous confession in evidence the magistrate treated it as if it had been properly obtained, and the prisoner might therefore well conceive that a subsequent confession

could do him no injury, and might possibly be better for him; and see the ruling of the same learned judge in *Rex v. Gilham*, *ante*, p. 456.

(y) Tindal, C. J., rejected this statement.

(z) *Reg. v. Horner*, 1 Cox, C. C. 364. No notice was taken of the statement having been incorporated in the deposition of the constable, and therefore treated by the magistrate as lawfully obtained;

the above Act, the prosecutor, before the prisoner was taken before a magistrate, promised him that if he would tell the truth he would do what he could for him; and when before the magistrate, who was not informed of this promise, he was cautioned not to say anything to criminate himself. Park, J. A. J., thought the confession made before the magistrate scarcely admissible, as there should have been an explicit and express warning against the promise which had been made by the prosecutor. (a)

Improper inducement by a policeman; and a statement to a superintendent afterwards without any caution by him.

Where a policeman said to the prisoner, who was charged with the murder of a bastard child, 'You had better tell all about it; it will save trouble;' and then put questions to her; Erle, J., held that her answers were inadmissible; but a superintendent of police having afterwards, about the same time, gone to the prisoner, and, without cautioning her, put certain questions to her; but it did not appear that he had referred to her statements to the policeman; she had, however, said when she saw him, 'Ah, I expected you:' and the questions related to the number of her children, and especially what had become of the youngest, with whose murder she was charged, and whether she had been at Colchester on a particular day; Erle, J., after consulting Wightman, J., held that the answers were admissible. (b)

Inducement by person in superior authority.

Where a person in superior authority holds out an inducement to a prisoner to confess, a confession made to a person in inferior authority is not admissible, especially if such person do not give the prisoner any caution. Upon an indictment for arson it appeared that the committing magistrate had told the prisoner that, if he would make a disclosure, he would do all that he could for him. The prisoner, after he was committed, made a statement to the turnkey of the gaol, who had held out no inducement to him to confess, and had not given him any caution not to confess. Parke, J., 'I think I ought not to receive the evidence, after what Mr. Simeon (the committing magistrate) said to the prisoner, more especially as the turnkey did not give any caution to the prisoner.' (c)

Inducement by a magistrate held re-

Where upon an indictment for murder it appeared that the prisoner had sent for the coroner, desiring to make some state-

and *Rex v. Smith*, *supra* was not cited, though a decision directly in point the other way, and resting, be it said (with all deference to that very great judge, C. J. Tindal), on very sound reasons. C. S. G.

(a) *Rex v. Compson*, Worcester Spr. Ass. 1829, MSS. C. S. G. The learned judge left it to the jury to say whether the prisoner had sufficient warning before the justice or not. This course seems to have been erroneous. See *Rex v. Nute*, *ante*, p. 458. See *R. v. Collier*, 3 Cox, C. C. 57; *R. v. Mellen*, 3 Cox, C. C. 507; *R. v. Doharty*, 13 Cox, C. C. 23.

(b) *Reg. v. Cheverton*, 2 F. & F. 833. The prisoner's statement was that the father of the child had written for it, and that she had sent it to him by a woman at the railway station at Colchester. The prisoner was acquitted, or the point would have been reserved; and the point deserves reconsideration.

(c) *Rex v. Cooper*, 5 C. & P. 535. The Reporters observe, 'If a person of inferior authority cautions a prisoner not to confess, after an inducement held out by a person of superior authority, it is important to consider whether a statement made by a prisoner under such circumstances would be receivable; as it seems to be but a fair conclusion that what was said to the prisoner by the magistrate would be much more likely to operate on his mind than anything subsequently said by a constable.' It may be added, that as the inferior can have no control over the superior, it is difficult to see how any caution by the inferior could do away with the effect of the inducement by the superior, as the prisoner must be aware that the inferior could have no power to prevent the superior from carrying his promise into effect. See the ruling of *Littledale, J.*, in *Rex v. Gilham*, *ante*, p. 458. C. S. G.



ment; the coroner told him that any confession that he made would be produced against him on the trial, and that no hope or promise of pardon could be held out to him, either by the government, or by any one else. Previous to this time a magistrate had had an interview with the prisoner, and had told him that if he was not the man that struck the fatal blow he would use all his endeavours to prevent any ill consequences from falling on him, if he would disclose what he knew of the murders, and that there were so many persons concerned in the transaction that it would be made known by some or other of them. The magistrate wrote a letter to the Secretary of State for the Home Department, to which he received an answer, stating that mercy could not be extended to the prisoner, for reasons that were therein mentioned; which answer he communicated to the prisoner: all this occurred before the prisoner sent for the coroner. It was objected that, although the inducement that the magistrate would interest himself with the government had been removed, yet there were two other inducements; first, the hope that would arise from the personal endeavours of the magistrate; and, secondly, the fear that if the prisoner did not confess, some one else would tell before him. Littledale, J., 'I think that this declaration is clearly admissible. I think that the conversation with the magistrate, after he received the Secretary of State's letter, and the caution given by the coroner, must be taken to have completely put an end to all the hopes that had been held out.' (d)

moved by a subsequent communication from the same magistrate.

Where a prosecutrix said to her servant-girl, who was in custody of a private person in her house at night, on a charge of administering poison, 'Jane, now you see the effects of your wickedness; you will be to go from here to-morrow morning to Stourbridge, to the magistrates, and not return again;' on which the girl said, 'Sooner than I will go from here, or anywhere else, I will tell the truth;' to which the prosecutrix answered, 'That is all I want.' A statement then made was held inadmissible. On the following morning a constable came to the house, and while there, without giving her any caution, said to the girl, 'My dear girl, where did you get the stuff from that you put in the tea and coffee?' It was held that what was then said must be considered as being under the influence of what was said the night before, because she was still in the house, and still in the hopes that she might not be taken before the magistrates. The constable afterwards took her to Stourbridge, and while on the way thither she made a statement, without any caution having been given, or any inducement having been held out to her, and this was held admissible, because the only hope was that she should not be taken away from the house, and this must have been at an end when she was taken away by the constable. (e)

Threat of taking before a magistrate at an end by actually taking thither.

(e) *As to Persons whose Inducements will exclude Confessions.*

With regard to the persons whose inducements will prevent the admission of confessions, it should seem that all who are engaged

As to the persons whose

(d) *Rex v. Clewes*, 4 C. & P. 221. See *Bryan's case*, Joy, 73. *Jebb's case*, 157.

(e) *Rex v. Jane Griffiths*, MSS. C. S. G. S. 110. See fully reported *Rex v. Richards*, 5 C. & P. 313, *Bosanquet*, J.

inducements  
will exclude  
confessions.

in the apprehension, prosecution, or examination of a prisoner are considered as persons of such authority that their inducements will exclude any confession thereby obtained. Thus an inducement held out by the prosecutor, (*f*) the prosecutor's wife, (*g*) or his attorney, (*h*) or by a constable or other officer, (*i*) or some person assisting a constable (*j*) or the prosecutor (*k*) in the apprehension or detention of the prisoner, or by a magistrate acting in the business, (*l*) or other magistrate, (*m*) or magistrate's clerk, (*n*) or by a gaoler (*o*) or chaplain of a gaol, (*p*) or by a person having authority over the prisoner, as by the captain of a vessel to one of his crew, (*q*) or by a master or mistress to a servant, (*r*) or by a person having authority in the matter, (*s*) or by a person in the presence of one in authority with his assent, whether direct or implied, (*t*) will be sufficient to exclude a confession made in consequence of such inducement.

Person accom-  
panying the  
prosecutor in  
pursuit.

The prisoner, when taken into custody, was told by a person who had accompanied the prosecutor in pursuit of the prisoner that it would be better for him to confess; but it was urged that, as he was a person who had no authority to interfere, the confession was admissible. *Littledale, J.*, 'That applies to mere strangers; here the person went with the prosecutor, and was acting with his authority and sanction.' The confession was rejected. (*u*)

Master of a  
ship.

Where a felony was committed on board a ship by the prisoner, one of the crew, towards another of the crew, and the master of the ship threatened to apprehend the prisoner, it was held that this threat excluded a confession; for the offence being a felony, and a felony having been actually committed, the master had power to apprehend the prisoner on reasonable suspicion that he was guilty. (*v*)

A person  
having a pri-  
soner in  
custody.

Where a constable, who had a prisoner in custody on a charge of murder, placed her in the custody of a woman whilst he went to the inquest, to prevent her going away, and the woman held out an inducement to her, it was held that a statement made in consequence was not admissible, as it was made after an inducement held out by a person who had her in custody. (*w*).

(*f*) *Thompson's case*, 1 Leach, 291.  
*Cass's case*, *ibid*.

(*g*) *Rex v. Upchurch*, R. & M. C. C. R. 465, *post*, p. 467.

(*h*) 1 Phill. Ev. 407. *Reg. v. Croydon*, 2 Cox, C. C. 67, an attorney endeavouring to discover some burglars for the purpose of prosecution, *ante*, p. 445.

(*i*) *Rex v. Sexton*, 1 Burn. J., D. & Wms. 1086.

(*j*) 1 Phill. Ev. 407.

(*k*) *Rex v. Stacey*, MSS. C. S. G. *infra*, note (*n*).

(*l*) 1 Phill. Ev. 407.

(*m*) *Rex v. Clewes*, 4 C. & P. 221, *ante*, p. 463.

(*n*) *Rex v. Drew*, 8 C. & P. 140, *ante*, p. 446.

(*o*) *Rex v. Gilham*, *ante*, p. 456.

(*p*) *Rex v. Gilham*, *supra*.

(*q*) *Rex v. Parratt*, 4 C. & P. 570.

(*r*) *Rex v. Upchurch*, *supra*. *Reg. v.*

*Taylor*, 8 C. & P. 733.

(*s*) 1 Phill. Ev. 407.

(*t*) *Reg. v. Taylor*, *supra*. *Rex v. Pountney*, 7 C. & P. 302. *Reg. v. Garner*, 1 Den. C. C. 329.

(*u*) *Rex v. Stacey*, *Monmouth Spr. Ass.* 1830, MSS. C. S. G.

(*v*) Anonymous, as stated by Parke. B., in *Reg. v. Moore*, 2 Den. C. C. 522. This seems to be the same case as *Rex v. Parratt*, *supra*, and *ante*, p. 456, except that the threat there was by the captain. The case as stated by Parke, B., fully supports my note (*w*) *infra*. C. S. G.

(*w*) *Rex v. Enock*, 5 C. & P. 539, Parke, J., after consulting Taunton, J. This decision is clearly right, though the last ground of the decision in *Reg. v. Sleeman*, Dears. C. C. 249, is the other way. C. S. G. *Sec R. v. Windsor*, 4 F. & F. 360.

'It has been argued, that a confession made upon the promises or threats of a person erroneously believed by the prisoner to possess authority, the person assuming to act in the capacity of an officer or magistrate, ought upon the same principle (on which confessions to persons having authority are rejected) to be excluded. The principle itself would seem to include such a case; but the point is not known to have received any judicial consideration.' (x)

Person supposed to possess authority.

If a confession be obtained by means of any improper inducement held out by a person who has no authority in the presence of a person having authority, and with his consent, it is not admissible. And it is not necessary that the person having such authority should express his consent in words; for if he be silent he will be presumed, as he did not express his dissent, to have sanctioned the inducement. (y)

Inducements used in the presence and with the sanction of persons in authority.

Upon an indictment for housebreaking, it appeared that the prisoner resided with her husband, and that a constable went to their house and charged her with breaking into the prosecutor's house, which she denied; but her husband coming in shortly afterwards, he told her if she knew anything about it to tell the truth; the constable, though present, made no observation, except that he must take her to the station-house, and desired her to go up stairs and put her things on; while she was up stairs she desired the con-

Inducement by a husband in the presence of a constable.

(x) Greenl. Ev. 258. As the question turns upon the effect produced upon the mind of the prisoner, and as that effect must be the same, whether the party be an officer or not, provided the prisoner believed him to be so, it should seem that a confession under such circumstances ought not to be admitted. See *Reg. v. Frewin*, 6 Cox, C. C. 530, *post*, p. 471. In considering these questions it should be remembered that every person has authority where a felony has been committed to arrest the party who committed it, *ante*, vol. 1, p. 711 *et seq.*; in this respect, therefore, a private individual and a constable stand upon the same footing, and this may be well deserving of consideration in cases where the inducement is held out in the absence of the prosecutor or an officer. If a private person after a felony had been committed were to tell a person not in custody that he suspected him of the felony, and that if he would confess he would let him go, but that if he would not he would apprehend him, it might, it is conceived, be well contended that a confession obtained thereby would be inadmissible, on the ground that the party had authority to apprehend, and was in effect a constable *pro hac vice*. After the recent cases, an inducement by a private person, it should seem, can only be considered as inoperative when it is given in the presence of a person in authority, such person expressing his dissent to it, or cautioning the prisoner against trusting to it, or where it is given to a prisoner in custody, no one having authority being present, as if a private person were to

advise a prisoner in gaol through the grating to confess, or send a letter to him to the same effect. 'The difficulty experienced in this matter,' observes Dr. Greenleaf, p. 259, 'seems to have arisen from the endeavour to define and settle, as a rule of law, the facts and circumstances, which shall be deemed in all cases to have influenced the mind of the prisoner in making the confession. In regard to persons in authority there is not much room to doubt. Public policy, also, requires the exclusion of confessions obtained by means of inducements held out by such persons. Yet even here the age, experience, intelligence, and constitution, both physical and mental, of prisoners are so various, and the power of performance so different in the different persons promising, and under different circumstances of the prosecution, that the rule will necessarily sometimes fail of meeting the truth of the case. But as it is thought to succeed in a large majority of cases, it is wisely adopted as a rule of law applicable to them all. Promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law that the confession must be voluntary being strictly adhered to, and the question whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left in the discretion of the judge under the circumstances of the case.'

C. S. M.

(y) *Rex v. Pountney*, 7 C. & P. 302.

Inducement by husband in order to exonerate himself.

stable to call her husband, and then made a statement as to certain articles of dress, which she produced, as having been purchased with the money which had been stolen. It was objected that what the prisoner said was inadmissible, as it was obtained by an inducement held out by her husband in the presence of the constable; and as the produce of the stolen property was found in the husband's house, he was *prima facie* liable to account for it, and that a statement made by the wife in the presence of and under the coercion of the husband, by which she accused herself and exculpated him, was clearly caused by undue influence on her mind; Pollock, C. B., 'The fact of the constable being present and not dissenting from what was said places the expressions used by the husband on the same footing as if they had been used by the constable; and I think that, as the constable was a person in authority, such an inducement ought to be sufficient to exclude the admission. Besides, I think there is a great deal of weight in what is urged as to the effect of the prisoner's statement being to exculpate her husband, and that I ought to be careful not to admit anything which may have been said in consequence of his coercion.' (z)

Inducement in the presence of a constable.

So where two prisoners charged with murder were being conveyed in a cart, and the constable was in the cart with them, and could hear all that passed, and one prisoner said to the other, 'You had better speak the truth,' and the constable made no remark; Wightman, J., after consulting Parke, B., held that a statement then made was inadmissible, as the inducement appeared to have the sanction of the constable who was present, and apparently assented to it. (a)

A threat in the presence of the owner of a mare on which an unnatural offence had been committed.

So where on an indictment for committing an unnatural crime with a mare, the prisoner was found by the owner of the mare in a stable with the mare, and his trousers undone, and the mare bleeding and straining; and a man shortly afterwards, at a house whither the prisoner had gone, said to the prisoner, 'I wish to know what business you had in the stable?' he said, 'You know.' The man said, 'I don't know, and have come on purpose to know, and will know before I leave, and if you don't tell me I will give you in charge to the police till you do tell me.' The prisoner said again, 'You know.' The man said, 'I don't know, but, according to what I could see of the mare, it is the best of my belief that you had connection with her.' He said, 'I had; for God's sake say nothing about it.' The owner of the mare was close by at the time this conversation took place. It was held, on a case reserved, that there was a threat used; and though at the time of the threat there was no statement of the charge, yet before the confession the prisoner was told, in the presence of the owner of the mare, that the charge was for having connection with the mare, which was just the same as if the threat had been made by the owner himself, and he, being the owner of the mare, was a person in such authority that a threat by him would exclude a subsequent confession. The confession, therefore, ought not to have been received. (b)

Inducement

So where upon an indictment for setting fire to the house of R.

(z) Reg. v. Laughner, 2 C. & K. 225.

(b) Reg. v. Luckhurst, Dears. C. C.

(a) Reg. v. Miller, 2 Cox, C. C. 997.

Lyford, it appeared that on the morning of the fire the prisoner, who was the servant of the prosecutor, was sent for into the parlour, in which Mrs. Lyford and Mr. Winders were; and that Mr. Winders, who was not a constable, or in any office or authority, said to the prisoner, 'You had better tell how you did it;' and that thereupon she made an answer. Patteson, J., said, 'It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority: and in this case I should have received the evidence of the statement made to Mr. Winders, if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. Lyford, who was the wife of the prosecutor and also the mistress of the prisoner, was present with Mr. Winders, and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the inducement must be taken as if it had been held out by Mrs. Lyford, who was a person in authority over the prisoner, and that therefore the evidence is inadmissible.' (c)

in the presence  
of a mistress.

On an indictment for a misdemeanor in attempting to set fire to her master's house, it appeared that the prisoner, a girl aged thirteen, was a domestic servant to the prosecutor, whose wife lived with him, and took her share in the management of the house. After the attempt to set fire to the house was discovered, the prisoner's mistress, in the absence of the prosecutor, said to her, 'Mary, my girl, if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if William H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you.' She made no answer. The mistress then said, 'Pray tell me if you did it.' The prisoner then confessed. It was contended on the part of the prosecution that the wife had no authority, real or apparent, over the prisoner, so as to hold out any hope which could influence the prisoner to make a false statement, in order that her life might be spared, and therefore that the confession was admissible. The confession was admitted, and the question as to its admissibility reserved for the consideration of the judges, who thought the confession ought not to have been received. (d)

A confession  
obtained from  
a servant  
through hopes  
and threats  
held out by  
the wife of the  
master and  
prosecutor is  
inadmissible.

So where upon an indictment for stealing the goods of two partners, the wife of one of the partners said, 'I told the prisoner it would be better for him if he would tell how we had been robbed, and put us on our guard. I occasionally take the management of the shop. I manage the shop in my brother and husband's absence.' For the prosecution it was urged that an inducement by the prosecutor's wife rendered a confession inadmissible only when it was held out in the presence of her husband. An inducement by the wife of a constable would not vitiate a confession; Parke, B., 'The wife of a constable has no control over the prisoner. This woman, being the wife of one of the prosecutors, and concerned in the management of their business, must be looked upon as a person in authority. I think this confession inadmissible.' (e)

Inducement  
by the wife of  
one of two  
partners.

(c) Reg. v. Taylor, 8 C. & P. 733.

329, *post*, p. 499.

(d) Rex v. Upchurch, R. & M. C. B. 465. See Reg. v. Garner, 1 Den. C. C.

(e) Reg. v. Wingham, 2 Den. C. C. R. 447, *note*.

The wife of a person, in whose house an offence is committed, and who is not the prosecutor nor engaged in the prosecution, apprehension, or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority so as to exclude a confession.

But where upon the trial of a prisoner for murder, there was offered in evidence against her a confession made by her in the presence of her mistress to a surgeon, who was attending her, of her having strangled her child with a thread, and placed the dead body in a privy, where it was found with the string round its neck. Her mistress had told her before the surgeon came in that 'she had better speak the truth,' and in answer she said she would tell it to the surgeon. An objection was taken that any subsequent confession was inadmissible. After consulting Coleridge, J., Parke, B., received the evidence, being of opinion that in this case her husband not being the prosecutor, nor the offence in any way connected with the management of the house, the prisoner's mistress could not be considered as having any control over the prosecution so as to raise a presumption that the inducement held out by her would be likely to cause her to tell an untruth. And upon a case reserved, after argument for the prisoner, Parke, B., delivered judgment: 'A rule has been laid down, that if the threat or inducement is held out actually or constructively by a person in authority, the confession cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. But in referring to the cases where the master or mistress have been held to be persons in authority, it is only when the offence concerns the master or mistress that their holding out the threat or promise renders the confession inadmissible. In the present case the offence of the prisoner, in killing her child and concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence. In practice the prosecution is always the result of the coroner's inquest. Therefore we are clearly of opinion that the confession was properly received.' (f)

Result of the cases.

The preceding cases clearly establish the position that, if a threat or inducement be held out in the presence of a person in authority, and he does not dissent therefrom, the effect is precisely the same as if it had been held out by the person in authority. (g)

The confession of a girl fifteen years old, occasioned by many applications by the prosecutor's relations and neighbours, amounting to threats and promises, is not admissible.

On a trial for setting fire to a house, it appeared that the prisoner, a girl about fifteen years old, was a servant in the prosecutor's house, and that soon after the fire was put out Handsley, a neighbour of the prosecutor's, said to the prisoner, 'I doubt you have set this house on fire by the candle between the laths.' She said she did not. On the same day, Mrs. Bowis, who lived about three hundred yards from the house of the prosecutor, and who was the mother of Mrs. Blackburn, the wife of the prosecutor, spoke to the prisoner in the prosecutor's house in the presence of Mrs. Blackburn, who was very deaf, and the prisoner's mother, and told her she had better confess the truth, because she believed

(f) *Reg. v. Moore*, 2 Den. C. C. 522, 3 C. & K. 153.

(g) *Reg. v. Parker*, L. & C. 42, at first sight may appear the other way; but in

all probability this decision proceeded on the ground that desiring a prisoner to tell the truth is not an inducement.

it was her that fired both the house and the stack, and that it would be a great deal the worse for her if she did not confess. The prisoner said she did not. On the same day the prisoner was taken before a magistrate at Spilsby. On the next morning, Mrs. Bowis saw the prisoner again on the road to her house. Mrs. Bowis said to the prisoner, she should not come to her house, and told her again it was her that fired both the house and stack; she said she did not do it. Soon after Handsley came up and joined them, and said to the prisoner, 'Don't be so bold; perhaps you will have to go to Spilsby to-morrow.' Spilsby was the place where the magistrates met. He told her that perhaps somebody will come forward to-morrow that saw you do it. She took her apron up and held it to her face, and said no more. She always denied it; and when Handsley said she might have to go to Spilsby she denied it again. He said, 'If you be guilty, go along with Mrs. Bowis and beg your master's and mistress's pardon, and get away, and be better in future, and we shall not seek after you'; and he said, 'Never mind your wages: I'll give you a few shillings out of my pocket.' And Handsley also told her it would be better for her to confess. After he went away, Mrs. Bowis went with the prisoner to Blackburn's house, and talked to her about the fire all the way; and after they got there, they went out of the house, and Mrs. Bowis said to the prisoner, 'Now, Sarah, you lighted the bunch of matches, and put it into the thatch of the house;' before she said that, she told the prisoner that if she went to Spilsby again she would be a great deal worse off, and she said to her several times, both going along the road to the prosecutor's house, and also in the house, and also when she spoke to her out of doors, that it would be a great deal better for her if she would confess, and a great deal worse for her if she did not confess. The counsel for the prisoner objected to evidence being given of what the prisoner said, on Mrs. Bowis charging her as before stated, on the ground that after these promises and threats had been held out to her, her answer could not be received unless she had a caution. For the prosecution it was contended that her answer might be received, because Handsley was neither a constable, nor did he stand in any relation to the prosecutor; and though Mrs. Bowis was the mother of the prosecutor's wife, yet that promises and threats made by a person standing in that situation were not sufficient to exclude a confession. Littledale, J., allowed the evidence to be given, but reserved the question for the opinion of the judges, whether it ought to have been received. On Mrs. Bowis saying to the prisoner, 'Now, Sarah, you lighted the bundle of matches, and put it into the thatch?' the prisoner said, 'Yes, I did.' Mrs. Bowis then told Mrs. Blackburn, what had passed, and Mrs. Blackburn then came out, and then Mrs. Bowis, in the presence of Mrs. Blackburn, asked the prisoner what she did it for; whether it was for anything against the family? She said 'No.' Mrs. Blackburn asked if any one persuaded her to it? She said 'No;'; she said she had no malice. The prisoner in her defence asserted her innocence, and said that Mrs. Bowis said that if she would confess to it she should have her liberty, and she added that she did it on purpose to get her liberty, and that they frightened her to do it. The

jury said they found the prisoner guilty with her own confession; but Littledale, J., told them they must find her either guilty or not guilty, and then they gave a verdict of guilty; and all the judges, upon a case reserved, were unanimously of opinion that the confession ought not to have been received, and that the conviction was bad. (*h*)

With regard to the persons whose inducements will not exclude a confession: the result of these cases seems to be, that a confession is not inadmissible, although made after an exhortation, or admonition, or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution, or examination of the prisoner: (*i*) for a promise made by a person who interferes without any authority of this kind is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess that he is guilty of a crime of which he is innocent.

The wife of the constable is not a person in authority. (*j*)

In a case of murder a surgeon stated that he had held out no threat or promise to induce the prisoner to confess; but a woman who was present said that she had told the prisoner she had better tell all; and then the prisoner made certain confessions to the surgeon. It was objected that, as the confession was made after an inducement held out, it could not be received in evidence; but Park, J. A. J., after consulting Hullock, B., held that as no inducement had been held out by the surgeon, to whom the confession was made, and the only inducement had been held out by a person having no authority, it must be presumed that the confession to the surgeon was a free and voluntary one. If the pro-

(*h*) *Rex v. Simpson*, R. & M. C. C. R. 410. The grounds upon which this decision proceeded are not mentioned in the report, and the real import of the case does not appear to be correctly abstracted in the text books, as observes Mr. Joy, p. 9; and after abstracting the case he well observes, 'that it was in the prosecutor's house, and in the presence of the prisoner's mother, and of the prisoner's mistress, a person in authority over her, and under her implied sanction, that the prisoner was told in the first instance that it would be better for her to confess. So in the conversation that immediately elicited the confession, the inducement was held out in the prosecutor's house, [this is an error, it was after "they went out of the house,"] and although it does not appear distinctly whether the prosecutor or his wife were then present, [it is clearly to be inferred that they were not present, for after the prisoner said "I did," Mrs. Bowis told Mrs. Blackburn, and she "then came out"] the influence caused by the inducement held out on the preceding morning, in the presence of the prosecutor's wife, and in his house, may perhaps be considered to have continued,' Joy, 10 and 11, and he refers to *Rex v. Upchurch*, ante, p. 467, and *Reg. v. Taylor*, ante, p. 467, to show that the mistress is a person in authority over the prisoner.

observed, also, that Patteson, J., held in *Reg. v. Taylor*, that an inducement held out by a person in the presence of the prisoner's mistress must be taken as if it had been held out by the mistress herself: from which it may be inferred that that very learned judge considered the person holding out the inducement as the agent for that purpose of the mistress. In that case, as the prosecutrix expressed no dissent, she was taken to have sanctioned the inducement; so in the present case the same must be inferred as to the inducement first held out in the presence of the mistress; and as by her conduct in the latter part of the transaction the prosecutrix sanctioned what Mrs. Bowis had done in her absence, the learned judges may have thought that Mrs. Bowis was the agent of the prosecutrix for the purpose of discovering the guilt of the prisoner. If a person were expressly employed by the prosecutor to discover the person who had committed a felony, there seems good reason why he should be considered as a person having so much to do with the apprehension and prosecution as to render a confession obtained by his inducements inadmissible. See *Rex v. Stacey*, ante, p. 464. C. S. G.

(*i*) *R. v. Row*, R. & R. 153. *R. v. Tyler*, 1 C. & P. 129.

(*j*) *Rex v. Hardwick*, 1 Phill. Ev. 408.

Inducements  
by persons  
not in autho-  
rity.



mise had been held out by a person having any office or authority, as the prosecutor, constable, &c., the case would be different; but here, some person having no authority of any sort officiously says, 'You had better confess.' No confession follows, but some time afterwards, to another person, the prisoner, without any inducement held out, confesses. The learned judge added, that he and Hullock, B., had not the least doubt that the evidence was admissible. (*k*)

The prisoner was indicted for placing a piece of iron on a railway, and a platelayer in the service of the company, but who was not employed by any of his superiors to see the prisoner, had told him that it would be a good deal better for him if he owned to it. The prisoner knew that the platelayer worked on the line. Cresswell, J., 'I am disposed to think the statement of the prisoner is receivable, the witness not being a person having any authority to make any promise; still he was in a position that might reasonably lead the prisoner to believe he had;' and thereupon the counsel for the prosecution declined to ask as to the statement of the prisoner. (*l*)

Inducement by a railway servant.

There has been a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable: some of the judges thinking it receivable, and others thinking it is not so. (*m*) And several cases have occurred, in which confessions made to persons without authority, in consequence of inducements held out by such persons, have been rejected. (*n*) But it is said to be the opinion of the judges that 'evidence of any confession is receivable, unless there has been some inducement held out by some person in authority.' (*o*)

Confession to a person not in authority after inducement by such person.

(*k*) *Rex v. Gibbons*, 1 C. & P. 97.

(*l*) *Reg. v. Frewin*, 6 Cox, C. C. 530. The prisoner was not defended. The marginal note treats this as an actual decision.

(*m*) Per Parke, B., in *Rex v. Spencer*, 7 C. & P. 776.

(*n*) In *Rex v. Dunn*, 4 C. & P. 543, a witness proved that the prisoner wished to sell a stolen book to him, and that he told him he had better tell where he got it. Bosanquet, J., 'Any person telling a prisoner that it will be better for him to confess will always exclude any confession made to that person. Whether a prisoner's having been told by one person, that it will be better for him to confess, will exclude a confession subsequently made to another person, is very often a nice question; but it will always exclude a statement made to the same person.' In *Rex v. Slaughter*, *ibid.* note (*a*), the same learned judge rejected a confession made by the prisoner to one of his fellow-workmen, who had told him it would be better for him to confess. In *Rex v. Arundel*, Gloucester Summer Assizes, 1830, the same learned judge ruled the same way, saying, 'if an unauthorised person makes a promise, it will not prevent a statement made to another person

from being received in evidence; but if the statement be made to the person who makes the promise, I think it ought not to be received.' The same distinction is also adverted to in a note to *Rex v. Gibbons*, *supra*. For this distinction, however, there seems no sufficient reason. The correct inquiry in every case is, whether the inducement was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty of a crime he did not commit. If it was, then a statement made under its influence, whether to the party using the inducement, or to another person, would be inadmissible. At the same time, it must ever be a circumstance deserving of consideration, in conjunction with others, that the prisoner did not make the confession to the party using the inducement at the time, but made it afterwards to another party; as that tends to show that he was not under the influence of the inducement when he confessed; and this is the view which the court seems to have adopted in *Rex v. Gibbons*. See also Mr. Joy's observations, pp. 26, 27. C. S. G.

(*o*) Per Patteson, J., in *Reg. v. Taylor*, 8 C. & P. 734. See *R. v. Moore*, 2 Den. C. C. 526, per Parke, B.

## (e) Confessions elicited by Questions.

A confession obtained without threat or promise from a boy fourteen years old, by questions put by a police officer in whose custody the boy was on a charge of felony, and when he had had no food for nearly a day, held rightly received.

As to the committing magistrate putting questions to the accused, see *post*, p. 503.

In a case where Miller, the chief officer of the police at Liverpool, stated, that on the 18th of November the prisoner, a boy of fourteen years of age, was apprehended by his directions, without any warrant, between twelve and one o'clock, and that he was carried to the police office about one o'clock. The magistrates were then sitting at a very short distance, and continued sitting till between two and three, and till the business presented to them was finished; but the prisoner was not carried before them, because the police officer was engaged elsewhere. The officer ordered the prisoner to Bridewell on his own authority, between four and five o'clock; and between five and six o'clock he told the prisoner that, in consequence of the falsehoods he had told, and the prevarications he had made, there was no doubt but he had set the premises on fire; and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The police officer replied that he would not have told so many falsehoods as he had if he had not been concerned in it, and he again asked him if anybody had induced him to do it? The prisoner then began to cry, and made a full confession. In speaking of the falsehoods, the police officer referred to an examination of the prisoner he had himself made. The prisoner was taken before he had dined, and had had no food from the time he was apprehended till after his confession. Bayley, J., thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was *perhaps illegal*, and when the conduct of the officer was calculated to intimidate, was admissible in evidence, and reserved the point for the opinion of the judges, a majority of whom held the confession rightly received, on the ground that no threat or promise had been used. (p)

Where rumours had been afloat that the prisoner had been delivered of a child, but the only ground for such suspicion was that she had been observed up to a certain time to increase in size, and had afterwards recovered her usual form; and in consequence of these rumours a police officer went to her, charged her with having been recently delivered, and with having murdered the child, or at least concealed its birth. The result of his questioning was that she made a statement, which he detailed. Erle, J., made strong observations on the impropriety of questioning the prisoner at the time when there was no proof of any crime having been committed, but the evidence was left to the jury. (q)

(p) *Rex v. Thornton*. P. & M. C. C. R. 27. Best, C. J., Bailey, J., and Holroyd, J., *dissentientibus*. *Reg. v. Kerr*, 8 C. & P. 176. Gibney's case, Joy, 36. *Reg. v. Hughes*, *ibid.* 39. Although there can be no doubt that confessions elicited by questions put by officers are admissible, still there can be equally little doubt that it is no part of the duty, or rather that it is a breach of the duty, of an officer to put questions to prisoners in

their custody, and learned judges have in many cases reprobated such conduct in the strongest terms; and in a recent case, where it appeared that a constable was in the practice of interrogating prisoners in his custody, Patteson, J., threatened to cause him to be dismissed from his office. Hill's case, *Rosc. Cr. Ev.* 45. *Reg. v. Hassett*, 8 Cox, C. C. 511.

(q) *Reg. v. Berriman*, 6 Cox, C. C. 388. It should, however, be borne in mind in

Confessions obtained by questions put by constables,

In one case in Ireland where a constable arrested a prisoner, and having given the usual and proper caution (*r*) proceeded to search his house, and having found the prisoner's coat, which was wet from washing, asked him why he had washed his coat? The Chief Baron ruled that the answer could not be given in evidence, and said that where a constable arrests a party he ought to abstain from asking questions; he ought to leave that duty to the magistrate, who alone has the power to reduce to writing what is said by the prisoner. (*s*)

So a confession obtained by questions put by the prosecutor's wife, (*t*) or by persons who are neither constables or officers, (*u*) or by a fellow prisoner, (*v*) is admissible. So where it was proposed on the part of the prosecution to prove what had been said by the defendant in his examination before a committee of the House of Commons, which the defendant had been compelled to attend; and on the part of the defendant it was objected that, since this statement had been made under a compulsory process from the House of Commons, and under the pain of incurring punishment as for a contempt of the House, the declarations were not voluntary, and could not be admitted for the purpose of criminating the defendant; Abbott, J., overruled the objection and admitted the evidence. (*w*)

Questions put by other persons.

(*f*) *When Prisoner's Examination on Oath Evidence.*

If the written examination of a prisoner taken before the committing magistrate purport to have been taken on oath, it is not admissible. An examination of a prisoner taken before a magistrate was written under the following words, which except as to the name were printed, 'The examination of — Hornage, taken on oath before me, &c.,' and was signed by the magistrate; and Le Blanc, J., rejected the examination, because it purported to have been taken on oath, and would not permit a witness to be examined for the purpose of showing that no oath had in fact been administered to the prisoner, saying that he could not allow that which had been sent in under the hand of the magistrate to be disputed. (*x*)

A prisoner's examination which purports to have been on oath before the committing magistrate, is not admissible.

these cases, that every peace officer is justified in apprehending on reasonable suspicion, *though no felony has been committed*; and that in cases of suspicion it may frequently be perfectly right for a peace officer to ask questions of a suspected person not in custody, provided such questions be fair and adapted to the particular circumstances.

(*r*) It is not stated what it was.

(*s*) *Reg. v. Bodkin*, 9 Cox, C. C. 403. This case seems to deserve reconsideration.

(*t*) *Rex v. Upchurch*, *ante*, p. 467.

(*u*) *Rex v. Wild*, *ante*, p. 444.

(*v*) *Rex v. Shaw*, 6 C. & P. 372.

(*w*) *Rex v. Merceron*, 2 Stark. N. P. C. 366. 'I think there must be some mistake in that case; the evidence must have been given without oath; and before a committee of inquiry, where the witness would not be bound to answer. *Director's Statement* was. *Reg. v. Gilham*, Lord Tenterden, C. J., in *Rex v. Gilham*,

*R. & M. C. C. R. 203*, on *Rex v. Merceron* being cited. See also in *Rex v. Garbett*, 2 C. & K. 483, further remarks on this case. So if a witness answers questions to which he might have demurred, as subjecting him to penalties, his answers may be used against him for all legal purposes; and therefore, in an action on 5 Geo. 2, c. 30, s. 21, the defendant's examination before the commissioners was allowed to be given in evidence, to show that by his own confession he had concealed the property of the bankrupt. *Smith v. Beadnell*, 1 Campb. 30. See also *Stockfleth v. De Tastet*, 4 Campb. 10.

(*x*) *Rex v. Smith*, 1 Stark. R. 242. See *R. v. Pikesley*, 9 C. & P. 124, Parke, B. But it seems, although there are cases to the contrary, that parol evidence might be given to show what the prisoner's statement was. *Reg. v. Wheeley*, 8 C. & P. 250; *Reg. v. Owen*, 9 C. & P.

So an examination beginning, 'This deponent saith,' has been rejected, as that implied that the statement was made upon oath. (z)

The ground on which these decisions proceeded was, that the account given by a prisoner before a magistrate ought not to be upon oath; and if the prisoner has been sworn, his statement cannot be received. (c)

But although it is quite correct to hold that an examination of a prisoner in writing purporting to be taken on oath is inadmissible, because such an examination is apparently taken in direct violation of the statute, yet it seems clearly erroneous to hold that, when in point of fact the examination has been regularly taken in accordance with the statute, no evidence of it should be admissible, because by accident or negligence it has been stated to be upon oath. Where in direct violation of the statute no examination in writing has been taken, evidence is admissible of what the prisoner said, (d) and *à fortiori* such evidence ought to be admitted where the statute has been substantially complied with, but an accidental error, in no way tending to the prejudice of the prisoner, has occurred. It is submitted, therefore, that where the examination on the face of it erroneously states the prisoner to have been examined on oath, it should be permitted to the prosecutor to prove that that was not the fact, and on such proof to give evidence of what the prisoner said before the magistrate.

Upon an indictment for administering poison, it appeared that on the day on which the prisoner was committed, she and several others were summoned before a magistrate, and at a time when she was under no charge, and when there was no specific charge against any person, she and the other persons were examined upon oath touching this poisoning, and their statements taken down in writing; but on the conclusion of the examination, the prisoner was committed for trial on this charge. It was proposed to put in the examination of the prisoner, and *Rex v. Tubby* (e) was cited. Gurney, B., 'This case is quite distinguishable from the case cited. Under the circumstances of that case I should have been disposed to agree with my brother Vaughan. I remember in the case of *Rex v. Walker*, which was a case of forging a will, I gave in evidence an affidavit made by one of the prisoners in the suit in Doctors Commons, and the prisoner was convicted and executed. But this being a deposition made by the prisoner at the same time as all the other depositions on which she was committed, I think it is not receivable. I do not think this examination was perfectly voluntary.' (f)

83; *Rex v. Rivers*, 7 C. & P. 177; *Rex v. Bentley*, 6 C. & P. 148, and MSS. C. S. G., *post*, s. 2 of this chapter.

(z) *Rex v. Shellswell*, Oxford Spr. Ass. 1828, Park, J. A. A. MSS. C. S. G.

(c) *Rex v. Smith*, 1 Stark. N. P. C. 242. As to examinations by magistrates generally, see *post*, p. 499.

(d) See the cases, *post*, p. 485.

(e) 5 C. & P. 530, *post*, p. 477.

(f) *Rex v. Lewis*, 6 C. & P. 161, and MSS. C. S. G. Mr. Phillips, vol. 1, p. 403, observes, 'When she was summoned

to appear, suspicion attached to her; and the case bears a strong resemblance to that of an individual examined on oath under a charge.' This is inaccurate, and neither warranted by the report in C. & P. nor my note of the case, and I was counsel in it. The prisoner was summoned in the ordinary way as a person who could give some evidence touching the matter, and not because any suspicion attached to her. See the note (i) *infra*. C. S. G.

Upon an indictment against a father and daughter for receiving stolen goods, it appeared that the daughter had been examined upon oath as a witness before the committing magistrate, and it was proposed to ask what she then said in the presence of her father. Gurney, B., 'I think you cannot do that. We cannot hear anything she said before the magistrate when she was a witness; if after having been a witness you make her a prisoner, nothing of what was said then can be admitted in evidence.' (i)

The prisoner being in Bridewell sent for a magistrate, and asked what was the charge against him, which the magistrate told him. Nothing further passed. About an hour afterwards the prisoner again sent for the magistrate, and made an information, which was produced. The magistrate made no threat, and held out no inducement to the prisoner, and did not caution him against criminating himself. He was sworn, and put his mark to it. The magistrate did not inform the prisoner that his information would be used against him. The magistrate thought the prisoner would be admitted as a Crown witness, and the prisoner might have been under that impression also. The prisoner 'was in as a Crown witness.' The prisoner swore his information again, but not in the presence of the other prisoners, but he refused to support his information, or appear as a witness. The magistrate had refused to admit the prisoner to bail. It was objected that the information was inadmissible as a confession, because the usual caution was not given, and an inducement was used; and, further, that its being on oath rendered it inadmissible; and upon a case reserved, it was held that the information ought not to have been received in evidence. (j)

With reference to an examination of a person charged as a prisoner taken upon oath, Mr. Phillpotts observes, 'As an examination, it is irregular: the modern statute, which regulates the proceedings of magistrates on criminal charges brought before them, makes a distinction between the examination of a prisoner and the informations of those who make the charge; the informations, but not the examinations of the prisoner, being especially required to be on oath. Since the statement upon oath cannot be received as a judicial proceeding or formal examination, is it admissible as a confession? There are objections to it also in that form; the oath imposed on the prisoner, especially whilst in custody, is likely to operate as a constraint, or as a kind of compulsion; the statement therefore cannot be considered as completely free and voluntary.' (k)

Observations by Mr. Phillpotts on examinations of prisoner on oath.

(i) *Rex v. Davis*, 6 C. & P. 177, and *MSS. C. S. G.* Mr. Phillpotts, vol. 1, p. 404, observes, 'It does not appear from the report that this individual was taken as a prisoner before the magistrate; but there were circumstances sufficient to raise a suspicion of guilt, and sufficient also to show that the statement was not perfectly voluntary.' It should seem, from the fact of her being examined as a witness, that she was not taken before the magistrates as a prisoner; and as to the circumstances sufficient to raise a suspicion of guilt, none such are stated to have been proved before the magistrate, either before or at the time when her ex-

amination was taken; and assuming that such suspicion might exist in the minds of the magistrates or others, or even that the prisoner might be aware that there was such suspicion, that was not the ground of the decision, but that the prisoner had been examined on oath as a witness; and after the decision in *Reg. v. Wheeler*, *post*, p. 479, it may perhaps be doubted whether this was a sufficient reason for rejecting the deposition. C. S. G.

(j) *Reg. v. M'Hugh*, 7 Cox, C. C. 483. C. S. G. See *Reg. v. Gillis*, 11 Cox, C. C. 69.

(k) 1 Phil. Ev. 402. Assuming that an oath may be likely to operate as a con-

Prisoner examined on oath by mistake, and error corrected.

If a prisoner is sworn and examined by a magistrate by mistake, and his deposition is destroyed, and an examination then taken in the regular way, it is admissible. On an indictment for arson against two prisoners, it appeared that when one of the prisoners was first brought before the magistrate, it was thought that he had appeared as a witness, and by mistake he was sworn; but it being discovered that he was one of the accused persons, the deposition, which had been commenced, was torn, and the prisoner subsequently made a statement, after having been cautioned by the magistrate; and that statement was offered in evidence. It was objected that the whole examination before the magistrate was but one transaction, and that the oath was binding during the whole inquiry. Garrow, B., 'What was first taken down and afterwards destroyed does not prejudice the prisoner. We do not know what he said: it is as if it never existed:' and the statement was received. (l)

Statement by prisoner not under charge or suspicion on oath as witness against another.

The principle of these decisions does not apply to a statement made by a prisoner, in an examination before a magistrate, when he was not in custody, but examined against another person on a distinct charge; provided, of course, there has been no inducement given to confess, and no promise of favour or of a reward for information; a statement so made by one in his capacity of witness, who was perfectly free to refuse answering any questions that had a tendency to expose him to a criminal charge, seems to be clearly admissible. (m) And it may be laid down generally

straint, there seems no reason whatever why, where a prisoner's examination has been taken upon oath, that fact should operate further than to raise a *prima facie* presumption that the statement was not voluntary, and to throw the onus of showing that it was spontaneous upon the prosecutor. Suppose, after the statement of a prisoner had been regularly taken without an oath, he were himself to volunteer to swear to the truth of it, and the magistrate were incautiously to permit him so to do, it would be difficult to assign any good reason why such a statement should not be admissible. In *Reg. v. Wheeler*, *post*, p. 479, Lord Abinger, C. B., said, in the presence of all the judges, 'I understand, if a prisoner's examination be on oath, it shall not be received in evidence without reference to a duress or threat; I see no reason for it; in principle the answer may be quite voluntary.' It should be remembered that a magistrate has no authority to administer such an oath, and therefore the prisoner has a right to refuse to take it. In *Reg. v. Wheeler*, on *Rex v. Tubby*, *post*, p. 477, being cited, Alderson, B., observed, 'It does not appear there that the oath was a lawful one:' from which, perhaps, it may be inferred that the very learned Baron considered that a distinction might be drawn between a lawful and an unlawful oath; and it is apprehended that such a distinction might well be drawn, as in the one case the justice has the power to enforce by commitment

an answer to any legal questions; in the other he has no such power. And see *Rex v. Shaw*, 6 C. & P. 372. The first mention of the mode of taking prisoners' examinations is in Kelyng, p. 2, where the judges' orders direct, 'that all justices of the peace do take examinations of the felons without oath.' The same is stated in B. N. P. 242. The first case where an examination was rejected on the ground that it purported to be on oath is *Rex v. Smith*, 1 Stark. R. 242, *ante*, p. 474. There is no doubt that an examination of a prisoner taken on oath is irregular, and therefore inadmissible as an examination under the statute, and, perhaps, the rejecting the examination of prisoners on oath altogether may have originated in not distinguishing between an examination admissible under the statute, and admissible as evidence at common law. The point seems to have been taken for granted in all the cases, and never solemnly discussed. C. S. G.

(l) *Rex v. Webb*, 4 C. & P. 564.

(m) 1 Phill. Ev. 404. In *R. v. Coote*, 42 L. J. Priv. C. Ca. 45, Sir R. P. Collier, whilst delivering the judgment of their lordships, and after referring to many cases, on the subject, said, 'From these cases to which others might be added, it results, in their lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to

that a statement upon oath by a person not being a prisoner, and when no suspicion attached to him, the statement not being compulsory, nor made in consequence of any promise of favour, is admissible in evidence against him on a criminal charge. (n) Thus where upon an indictment for forgery, it appeared that, before the prisoner was either charged with or suspected of having committed any offence, one Shearer had been examined on a charge of forgery, and that the prisoner was called as a witness against Shearer on that occasion, and sworn to a deposition, which was proposed to be read against the prisoner; and it was objected that the deposition, being a statement made upon oath, could not be received as evidence against the prisoner; Parke, J., said, 'I think I ought to receive this evidence. The prisoner was not, at the time when he made this deposition, charged with any offence: and he might on that, as well as on any other occasion, when called as a witness, have objected to answer any questions which might have a tendency to expose him to a criminal charge; and not having done so, his deposition is evidence against him.' (o) So where on an indictment for burglary it was proposed to read a statement made upon oath by the prisoner, at a time when he was not under any suspicion, and it was objected that it was a violation of the rule of law that a prisoner should not be sworn; Vaughan, B., said, 'I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, is it a statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when he made it.' (p)

So where on an indictment for threatening to accuse of an infamous crime, it appeared that the prisoners had made a charge against the prosecutor, and been examined before the magistrate as witnesses against the prosecutor, and their depositions contained both their examinations and cross-examinations; their answers on cross-examination were not only contradictory in themselves, but quite inconsistent with each other. It was held that the examinations were admissible, but that the cross-examinations were not, as there was not any such connection between these answers and the particular charge in this indictment as to make them relevant. (q)

which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle *nemo tenetur seipsum accusare*, but does not apply to answers given without objection, which are to be deemed voluntary.' In another part of the judgment Sir R. P. Collier said, 'With respect to the objection that Coote, when a witness, should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned, it is enough to say that the caution is, by the terms of the statute, applicable to accused persons only, and has no application whatever to witnesses.'

(n) *Ibid.* See *R. v. Colmer*, 9 Cox, C. C. 506; *R. v. Bateman*, 4 F. & F. 1068.

(o) *Rex v. Haworth*, 4 C. & P. 254. *Greenw. Stat.* 138 n.

(p) *Rex v. Tubby*, 5 C. & P. 530. The deposition was not read, but withdrawn by the counsel for the Crown, as it did not contain anything material. In *Reg. v. Wheeler*, *infra*, Vaughan, J., said, 'In *Rex v. Tubby*, what reason is there for saying that there was any restraint on the person making the statement?'

(q) *Reg. v. Braynell*, 4 Cox, C. C. 402, Williams, J. The particulars of the cross-examinations are not stated. See my note on this decision, *ante*, p. 260. To which it may be added that the examination and cross-examination formed one document, and, according to the general rule, the whole ought to have been read. See *Goss v. Quinton*, 3 M. & Gr. 825, where an examination of a bankrupt contained his examination in chief and cross-examination, and in the latter a copy of an agreement was incorporated, and it was held that the examination was one entire thing,

So where Chidley and Cummins were indicted for maliciously wounding, and at the examination before the magistrates Chidley alone was charged with committing the offence, and Cummins came forward voluntarily, and gave evidence exculpating Chidley, and confessed that he had inflicted the injuries upon the prosecutor, and upon this he and Chidley were committed; it was held that Cummins' deposition was admissible. (r)

Where a witness claims the protection of the court on the ground that an answer may criminate him, and is compelled to answer, the answer is inadmissible.

On an indictment for forging the acceptance of a bill of exchange, 'Accepted, payable at Masterman & Co's., London, William Booth,' it appeared that the prisoner had been called as a witness for Booth in an action brought against him on that bill, and in cross-examination he made several statements tending to show that the acceptance was a forgery without objection, and afterwards either put himself in the hands of the court or declined to answer questions put to him, but he was compelled to answer these questions, and this examination of the prisoner was proposed to be given in evidence on the trial for forgery; the counsel for the prisoner objected to those parts of the cross-examination being read which followed the prisoner's declining to answer, and applying to the court for protection. The objection was overruled, and, on a case reserved, it was held that if a witness claims the protection of the Court, on the ground that the answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer; and, if obliged to answer notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot be given in evidence against him; and that it made no difference in the right of the witness to protection that he had chosen to answer in part, as he was entitled to it at whatever stage of the inquiry he chose to claim it, and that no answer forced from him by the presiding judge, after such claim, could be given in evidence against him. (s)

A compulsory examination of a bankrupt is admissible against him.

The prisoner was indicted for mutilating one of his trade books, and his examination before the Court of Bankruptcy was given in evidence against him. In this examination questions were put, and answers obtained to them under the threat of committal; these questions and answers related to the prisoner's trade books. Upon a case reserved it was held that, as all the questions touched matters relating to his trade dealings or estate, the bankrupt was bound to answer them, although by his answers he might criminate himself. That the questions, though tending to criminate the bankrupt, are made lawful, and if he refuses to answer them he is liable to be committed as upon a refusal to answer any other

and that the whole must be put in evidence, including the cross-examination and copy of the agreement. C. S. G.

(r) *Reg. v. Chidley*, 8 Cox, C. C. 365. Cockburn, C. J.

(s) *Reg. v. Garbett*, 1 Den. C. C. 236, 2 C. & K. 474. This was the ruling of nine judges, Parke, B., Alderson, B., Coltman, J., Maule, J., Rolfe, B., Wightman, J., Cresswell, J., Platt, B., and Williams, J., against Lord Denman, C. J., Wilde, C. J., Pollock, C. B., Patteson, J., Coleridge, J., and Erle, J. The nine

judges did not decide, as the case did not call for it, whether the mere declaration of the witness on oath, that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering, where other circumstances did not appear in the case to induce the judge to believe that it would not. The nine judges did not think *Dixon v. Vale*, 1 C. & P. 278, and *East v. Chapman*, 2 C. & P. 573, binding authorities. See *post*.



lawful question. That the statute has taken away the privilege that a party is not bound to accuse himself, and has enacted that he must answer questions, by answering which he may be criminated; and that one of the consequences is that what may be stated by a person in a lawful examination may be received in evidence against him. The examination, therefore, was properly received. (t)

Where the bankrupt's examination in the Court of Bankruptcy was not respecting any matters relating to the trade dealings or estate of the bankrupt, the Court held that the examination was properly received. Upon the trial of an indictment against the bankrupt for uttering a forged letter with intent to obtain goods, the proper test is whether the party *may* object to answer. If he may, and he does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible against him. This examination was not touching any matters relating to the trade dealings or estate of the bankrupt; he might have objected to the examination, but he did not do so; the examination therefore was voluntary and admissible. (u)

Upon an indictment for forging a deed, the answer and deposition in chancery of the prisoner were tendered in evidence against the prisoner, and were objected to on the ground that they were upon oath; but Vaughan, B., was clearly of opinion that they were admissible, being made before any charge was made against the prisoner. The amended bill in the same suit in chancery was put in and read; it contained a charge of forging the deed against the prisoner, on which it was again objected that the answer and deposition of the prisoner were not admissible, upon the ground that the bill contained such charge of forgery. Vaughan, B., 'The argument would go the length of not admitting depositions in the case of perjury. If the party chooses voluntarily to answer, he is bound by it, and the answers are admissible.' (v) So on an indictment for a conspiracy, the answers in chancery of the defendants, which had been made by them upon oath, in a suit which had been instituted by the prosecutor, are admissible in evidence. (w)

Answers and depositions in chancery.

(t) *Reg. v. Scott*, D. & B. 47; 25 L. J. M. C. 128. Coleridge, J., dissented. *Reg. v. Cross*, Dears. C. C. 68, S. P. R. v. Widdop, 42 L. J. M. C. 9; L. R. 2 C. C. R. 3. R. v. Robinson, 36 L. J. M. C. 79; L. R. 1 C. C. R. 80. R. v. Hillam, 12 Cox, C. C. 174, vol. 2, p. 447. See *R. v. Wheeler*, 2 M. C. C. R. 45, 2 Lew. 157. R. v. Britton, 1 M. & Rob. 297. R. v. Cherry, 12 Cox, C. C. 32.

(u) *Reg. v. Sloggett*, Dears. C. C. 656; 25 L. J. M. C. 93. In *Reg. v. Darby*, 2 Cox, C. C. 316, a bankrupt had been examined before a commissioner, not so much with a view to oppose his certificate as to this prosecution, which was for false pretences, and he had not been cautioned; but his solicitor was present; and the Recorder held that, as he had been examined for the purpose of this prosecution, and not with reference to the bankrupt laws, his ex-

amination was inadmissible. But this decision can hardly be considered as an authority after *Reg. v. Sloggett*, and *Reg. v. Scott*, *supra*, and there is no weight in the fact that the prisoner had been examined with a view to the prosecution; that is done every day in cases of perjury, and it cannot affect the admissibility of the evidence. See *Stockfleth v. De Tastet*, 4 Campb. R. 10.

(v) *Rex v. Highfield*, Stafford Sum. Ass. 1828, MSS. C. S. G. The prisoner was executed. See *Rex v. Lewis*, *ante*, p. 474, as to an affidavit in a suit in the Ecclesiastical Court.

(w) *Reg. v. Goldshede*, 1 C. & K. 657. Lord Denman, C. J., who observed that 'the very oath on which an answer in chancery is given is the foundation of these indictments for perjury which we are trying almost daily.'

Affidavit.

An affidavit of a person is admissible against him in both criminal and civil cases. (*x*)

Prisoner  
examined  
before a poor  
law inspector.

The prisoner was indicted for having made a false declaration, the statements in which subsequently became the subject of an inquiry before one of the poor law inspectors, under the authority of secs. 19, 20 of the 10 & 11 Vict. c. 90, (*g*) and the prisoner was examined on oath respecting the declaration, and her answers were reduced to writing in a minute-book, and she had affixed her mark; she was not cautioned that what she said would be used against her; and her statement was held inadmissible, on the ground that the answers were given by an illiterate person, who had not been cautioned, under the compulsion of an oath. (*h*)

As to the ad-  
missibility of a  
deposition  
made before a  
coroner.

A difference of opinion has existed whether the examination of a person upon oath as a witness, before a coroner, be admissible in evidence against such person on his trial. In a case tried at Worcester, where it appeared that a coroner's inquest had been held on the body of A., and, it not being suspected that B. was at all concerned in the murder of A., the coroner had examined B., as a witness; Park, J. A. J., would not allow the deposition of B., so taken on oath, on the coroner's inquest, to be read in evidence on the trial of an indictment against B. for the same murder. (*y*)

Depositions  
before a cor-  
oner by pri-  
soners ad-  
mitted on a  
trial for a rape  
on the de-  
ceased.

Upon an indictment for rape against Owen, Ellis, and Thomas, it appeared that an inquest had been held upon the body of the woman alleged to have been ravished, and the coroner stated that at the inquest Owen made four statements; he had been sworn before each statement; each of the statements was taken down in writing, and signed by Owen. Ellis made and signed a statement, and so did Thomas; they were sworn before the statements were made. No inducement of any kind was held out to either of the prisoners to make any statement; neither threat nor promise; they were all three brought before the coroner in custody. It was objected that these statements were not receivable in evidence, as they were on oath. These persons were in custody; and in *Reg. v. Wheeley*, (*z*) Alderson, B., rejected the statement of the prisoner, which had been taken at the inquest, because it was on oath, and taken while he was in custody. Williams, J., 'I know that my brother Alderson did so, but I also know that since that there has been a reaction of opinion (if I may be allowed the expression); I shall therefore receive the evidence, and reserve the point if it should become necessary.' (*a*)

(*x*) Per Lord Denman, C. J., *Reg. v. Goldshede*, *supra*. *Rex v. Walker*, cited 6 C. & P. 161.

(*g*) Sec. 19 authorizes the commissioners or inspectors to summon any person they think fit, and administer an oath, &c. Sec. 20 makes every person giving false evidence guilty of perjury, and every person who refuses to give evidence guilty of a misdemeanor.

(*h*) *Reg. v. Murtagh*, 6 Cox, C. C. 447. Pennefather, B., and Moore, J.

(*y*) Anonymous, 4 C. & P. 255, note

(*b*). In *Rex v. Clewes*, reported as to other points in 4 C. & P. 221, the grand jury asked Littleale, J., 'Can the evidence of a prisoner, who was exa-

mined on oath before the coroner as a witness, be admitted as evidence against the same person, when subsequently indicted for the murder of the person on whose body the inquest was held?' Littleale, J., 'Whatever any prisoner says at any time against himself is evidence, and therefore such a statement is admissible.' The preceding case was then mentioned, on which the learned judges seemed to entertain doubts upon the point, but directed the grand jury to receive the evidence, and leave the point for discussion upon the trial. MSS. C. S. G.

(*z*) *Ante*, p. 473.

(*a*) *Reg. v. Owen*, 9 C. & P. 83. The report then proceeds—Mr. Tooke (the

But where upon an indictment against the same prisoners for the murder of the same female, whom they had been charged in the preceding case with ravishing, the same depositions of the prisoners, taken on oath on the coroner's inquest held on the body of the deceased, (b) were tendered in evidence; Gurney, B., said, 'I am not aware of any instance in which an examination on oath, before a coroner or a magistrate, has been admitted as evidence against the person making it. I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected. In my own experience I do not recollect a case of a deposition before a coroner.' After mentioning *Reg. v. Wheeler*, (c) the learned Baron added, 'I confess that I do not, on principle, see the distinction between that and some of the other cases; still I am of opinion that in the present case I ought to reject the evidence.' (d)

The same depositions rejected on a trial for murder of the same woman.

Upon an indictment for the murder of Elizabeth S., it appeared that no suspicion arose that her death had been caused by poison until after the death of Mary Ann S.; but the parents having insinuated that Mary Ann had been poisoned by Riley, she was taken into custody upon the charge, and on the examination before the coroner as to the cause of Mary Ann's death, the mother was examined on oath as a witness, and her deposition was taken in writing, and read over to her, and she put her mark to it. In the course of that examination questions were put to her relative to the death of Elizabeth, and in consequence of her answers, and other circumstances, the body of Elizabeth was disinterred, examined, and found to contain arsenic in the stomach. The parents were thereupon taken into custody, and brought before the coroner, in custody, separately. The mother was told that she was charged with having poisoned her two children, and that that was the time when she might make any statement that she liked to the jury, and that what she said would be taken down in writing. Her former deposition made by her as a witness was then read over to her, and she said that she had a further statement to make, which she made, and what she said was written down, and afterwards read over to her; she was asked to sign it, and refused. The coroner signed it, and it was produced and offered in evidence against the mother, together with her original deposition. It was objected that as the greater part of the statement had been made by the prisoner, when under examination before the coroner upon oath, it could not be read in evidence against her. Erskine, J., received the evidence, but reserved the point for the consideration of the judges. (e) But as the mother was acquitted, the judges thought it unnecessary to determine the question.

Deposition before a coroner on an inquest on the body of one person read over on the inquest on another body, and additional statement then made to it.

So on an indictment for murder, Parke, B., received in evidence a deposition made by the prisoner on oath as a witness before the coroner. (f) So also on a trial for manslaughter, Martin, B., after

Depositions before a coroner admitted on the

coroner) recalled: 'I asked Owen if he was desirous of giving his evidence, and he said, Yes: he was sworn, and gave evidence. I asked each of the other prisoners if he wished to give evidence, and each said that he did.' Alderson, B., was the other judge at Stafford when this case was tried.

(b) This is the whole statement in the report.

(c) *Ante*, p. 479.

(d) *Reg. v. Owen*, 9 C. & P. 233.

(e) *Reg. v. Sandys*, C. & M. 345.

(f) *Reg. v. Howarth*, Greenw. Coll. 134; *Stacy*, 11 C. & P. 203. See *R. v. Colmer*, 9 Cox, C. C. 506.

trial of the witness for murder and poisoning.

consulting Willes, J., admitted as evidence against the prisoner his deposition on oath taken by the coroner upon the inquest held on the deceased. (*ff*) And where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion; no charge had at that time been made against her; she made a statement on oath, which the coroner took down in writing. Lord Campbell, C. J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed. (*g*)

Result of the cases.

The results deducible from the cases seem to be that it is now clearly settled that the mere fact of a party having been examined upon oath will not exclude a statement made by him. (*h*) It is obvious that such a statement may be just as voluntary as if it were not upon oath, as where a party tenders himself as a witness, and requests to be sworn, of his own mere motion. So too it is clearly settled that if a party be examined upon oath, and has an opportunity of objecting to answer any questions which he thinks may tend to criminate himself, but he answers such questions without objection, his answers are admissible in evidence against him in a criminal proceeding. (*i*) In such a case, by not objecting when he is entitled so to do he is taken to have answered the questions voluntarily. It is equally clearly settled that in such a case it is not necessary that the witness should have been cautioned or put upon his guard as to the tendency of the questions, in order to render his answers admissible. Lastly, if the witness objects to answer any question as tending to criminate himself, but the Court improperly compels him to answer it, the answer is not admissible against him. (*j*)

(*g*). *Discoveries and Acts done in consequence of Confession unduly obtained.*

Discoveries in consequence of confessions unduly obtained.

It has been determined that, although confessions improperly obtained are not admissible, yet that any facts, which have been brought to light in consequence of such confessions, may be received in evidence. (*k*) Thus where a prisoner was indicted as an accessory after the fact for having received property, knowing it to be stolen, and had, under promises of favour, made a confession, and in conse-

(*ff*) *R. v. Bateman*, 4 F. & F. 1068.

(*g*) *Reg. v. Sarah Chesham*, Chelmsford, March 6, 1861. MSS. This note was submitted by the Editor to Lord Wensleydale, who replied that he had no doubt the note of the decision was correct; though he did not recollect that he was consulted by Lord Campbell, yet he could not doubt that he was. The evidence was not sufficient to prove that the husband died of poison, and therefore the prisoner was indicted for administering it, as Lord Campbell informed the Editor. C. S. G.

(*h*) See *R. v. Coote*, 42 L. J. P. C. 45; L. R. 4 P. C. 599.

(*i*) *Reg. v. Garbett*, 1 Den. C. C. 236, *ante*, p. 478.

(*j*) *Reg. v. Garbett*, *ante*, p. 478. *R. v. Coote*, 42 L. J. P. C. 45. It may be remarked that by the Irish Act, 9 Geo. 4, c. 54, s. 2, which was framed on the 7 Geo. 4, c. 64, s. 2, as to taking the examinations of witnesses in felony, it was provided that 'no such examination shall subject the party examined to any prosecution or penalty, or be given in evidence against such party, save on any indictment for having committed wilful and corrupt perjury in such examination;' which seems to show that, otherwise such an examination might have been given in evidence in any case.

(*k*) 1 Phill. Ev. 411. See *Reg. v. Leatham*, 8 Cox, C. C. 498.

quence of it the property had been found in her lodgings, concealed between the sackings of her bed ; it was held that the fact of finding the stolen property in her custody might be proved, although the knowledge of it was obtained by means of an inadmissible confession. (l) So where a prisoner indicted for stealing a number of diamonds and pearls had been improperly induced to make a confession, from which it appeared that he had disposed of part of them to a certain person ; it was held allowable on the part of the prosecution to call that person to prove that he had received the property from the prisoner. (m) As far as these cases go, there can be no difficulty as to the propriety of the decisions, because the bare fact of the property being found in the possession of the prisoner in the one case, and of his dealing with it as his own in the other, would, unconnected with any confession, have been clear evidence in support of the prosecution. But the cases have gone further than this, for it has been held that, on a prosecution for receiving stolen goods, where a confession had been improperly drawn from a prisoner, in the course of which he described the place where the goods were concealed, evidence might be given *that he did so describe the place*, and that the goods were afterwards found there. (n) In this case it is clear that the bare fact of finding the goods would be no evidence against the prisoner, unless coupled with a part of the improperly obtained confession. And some have accordingly doubted whether any part of such a confession can properly be used for such a purpose. Thus in *Harvey's case*, Lord Eldon, C. J., said, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it ; and he so directed the jury in that case. (o) But the more established rule, according to later practice and later authorities, is, that so much of the confession as relates *strictly* to the fact discovered by it may be given in evidence ; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false ; but the fact discovered shows that so much of the confession as immediately relates to it is true. (p) Thus it is proper, and it is now the common practice, to leave to the consideration of the jury, where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen

What is the correct rule where property is found in consequence of a confession improperly obtained.

(l) *Rex v. Warickshall*, 1 Leach, 263, O. B. 1783. *S. P. Mosey's case*, 1 Leach, 265 n. O. B. 1784. So in *Rex v. Harris, R. & M. C. C. R. 331, post*, p. 508, after the prisoners had been before the magistrate, one of the prisoners went with one of the prosecutors to a field, and said he could find the skin buried, and showed the place, which was dug up and the skin found. So in *Thurtell's case*, cited in *Alison's Cr. L. of Scotland*, p. 584, and *Joy, 84*, although a confession obtained by means of promises of impunity held out was not used in evi-

dence against him, yet the fact that the goods were recovered, or the corpse found, in consequence of the confession, at the place mentioned in the confession, was held receivable in evidence.

(m) *Lockhart's case*, 1 Leach, 386.

(n) *Grant's case* and *Hodge's case*, 2 East, P. C. 658.

(o) 2 East, P. C. 658. See also *Mosey's case*, 1 Leach, 265, in note to *Warickshall's case*.

(p) *Rex v. Butcher*, 1 Leach, 265, note (n) to *Warickshall's case*, 2 East, P. C. c. 16, s. 94, p. 658.

or put them there, which is to be collected or not from all the circumstances of the case. (*q*) So where on an indictment for burglary it appeared that the prisoner had made a statement to a policeman, under some particular circumstances, which induced the counsel for the prosecution, with the approbation of the Court, to decline offering it in evidence; but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked whether, in consequence of something which the prisoner had said, he made a search for the lantern; Tindall, C. J., and Parke, B., were both of opinion that the words used by the prisoner, with reference to the thing found, ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's Fields. The other parts of the statement were not given in evidence. (*r*)

But where on a trial for concealing the birth of a child it appeared that, after the prisoner had been cautioned in the usual manner, and had stated that she had nothing to say, the magistrate, before committing her, asked her where she had put the body of the child; Erle, J., refused to receive the statement in evidence. It was then proposed to ask whether, in consequence of the answer she had given to the magistrate, the witness had made a search in a particular spot, and had found a certain thing. Erle, J., 'No; not in consequence of what she said. You may ask him what search was made and what things were found, but under the circumstances, I cannot allow the proceeding to be connected with the prisoner.' (*s*)

Acts done in consequence of a confession.

So it has been determined, after a consideration by all the judges, that, although a confession improperly obtained cannot be received in evidence, yet that any *acts* done afterwards may be given in evidence, notwithstanding they were done in consequence of such confession. (*t*)

Declarations accompanying such acts.

And it should seem that what the prisoner says at the time such acts are done may also be received in evidence. The prisoner was charged with stealing a guinea and two promissory notes, one of which was a Bank of England note for five pounds, and the other a Reading bank note for the like sum. The prosecutor had told the prisoner that he had better confess. Chambre, J., held that, although the prosecutor could not be allowed to prove a confession made after this admonition, he might be permitted to give evidence that the prisoner bought to him a guinea and a five pound Reading bank note, *which he gave up to the prosecutor as the guinea and one of the notes that had been stolen* from him. The note thus produced the prosecutor could not identify otherwise than by its corresponding with the stolen note in the sum for which it was given, and in being a note of the same bank. Upon a case re-

(*q*) 2 East, P. C. c. 16, s. 94, p. 658.

(*r*) Reg. v. Gould, 9 C. & P. 364. Mr. Phillpotts, vol. 1, p. 412, after stating this case, adds, 'But the judge in such a case would direct the jury, and so it is understood did direct the jury in that case, that his statement must not be taken as proof that *he concealed*, but merely as evidence that *he knew of or*

was privy to the concealment, from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself.'

(*s*) Reg. v. Berriman, 6 Cox, C. C. 388.

(*t*) Warwickshall's case, 1 Leach, 265.

served, the majority of the judges (*u*) agreed with Chambre, J., in thinking the conviction right and the evidence admissible. (*v*)

But not only are confessions excluded when obtained by means of improper inducements, but also the acts of the prisoner done under the influence of such inducements, unless confirmed by the finding of the property; for the same influence which might produce a groundless confession might produce groundless conduct. A prisoner was indicted for larceny, and had been induced by a promise from the prosecutor to confess his guilt; and after that confession he carried the officer to a particular house as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it; that person, however, denied knowing anything about it, and the property was never found; it was held that not only the confession, but the fact of the prisoner's carrying the officer to the house as above mentioned, was inadmissible in evidence. The confession was excluded because, being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner, under the same influence, *not being confirmed by the finding of the property*, were open to the same objection. The influence which might produce a groundless confession might also produce groundless conduct. (*v*)

Not admissible except when confirmed.

(*h*). *Against whom Confessions and Statements Evidence.*

The statement or confession of one prisoner, made in the absence of another prisoner when not before a magistrate, is only evidence against himself, and not against another prisoner: (*x*) and in general, the confession of one prisoner on his examination before a magistrate is only evidence against the party who made the confession, and cannot be made use of against any others, whom on his examination he confessed to be engaged with him in committing the offence; (*y*) and even if such confession were made before a magistrate in the hearing of another prisoner, it would not be evidence against such prisoner; on the ground that there is a regularity of proceeding adopted before a magistrate, which prevents the prisoner from interposing when and how he pleases, as he would in a common conversation, and the prisoner is brought to answer the charge and evidence given against him, and not the statement made by another prisoner. Thus where the confession was made before a magistrate in the presence and hearing of the

Confession evidence against the party confessing only, although made before a magistrate in the hearing of an accomplice, who did not deny it.

(*u*) Lord Ellenborough, C. J., Mansfield, C. J., Macdonald, C. B., Heath, J., Grose, J., Chambre, J., and Wood, B. But Lawrence and Le Blanc, Js., were of opinion that the production of the money was alone admissible, and not his saying at the time he produced one of the notes 'that it was one of the notes stolen from the prosecutor.' And see *Rex v. Jones*, R. & R. 152. *Ante*, p. 445.

(*v*) *Rex v. Griffin*, R. & R. 151

(*w*) *Rex v. Jenkins*, R. & R. 492. Mr. Philipps, Ev. vol. 1, p. 413, says, 'It was held that the evidence of what passed between the prisoner and the officer ought not to have been received, that is, it

was not receivable as evidence against the third person.' This is clearly an error; there was only one prisoner indicted, and he for the larceny, and the only question was, whether the evidence was admissible against him. If the person pointed out had been indicted as the receiver, the fact of the prisoner pointing him out as the person, in his presence, and his denial, would undoubtedly have been admissible in evidence against such person. See *Reg. v. Cox*, 1 F. & F. 90, *post*, p. 848. C. S. G.

(*x*) *Hevey's case*, 1 Leach, 232.

(*y*) *Thompson's case*, Kel. 18.

accomplice, who did not deny it, Holroyd, J., held (z) that these circumstances were not evidence against the latter, and said that it had been so ruled by several of the judges in a similar case, which had been tried at Chester. (a) So where a confession of the principal, made before a magistrate in the presence of the receiver, in which she stated various facts implicating the receiver, and others as well as herself, was tendered in evidence; Patteson, J., refused to receive in evidence anything that was said by her respecting the receiver. (b)

Deposition of a witness on a summary conviction.

Upon similar grounds also the deposition of a witness who has been examined against a person before a magistrate in a case of summary conviction is inadmissible. In an action for maliciously laying an information against the plaintiff, it was proposed to prove what a witness, called for the defendant, had said in the plaintiff's presence before the magistrate on the hearing of the information, on the ground that he had had the opportunity of cross-examining the witness, and commenting on his testimony; Parke, J., said, 'I think it is the safer course to refuse it, and to hold that the deposition of a witness taken in a judicial proceeding is not evidence, on the ground that the party against whom it is sought to be read was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person, who merely happened to be present, and who, being a stranger to the matter under consideration, had not the right of interfering; and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony; but still, in an investigation of this nature, there is a regularity of proceeding adopted which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inferences, therefore, cannot be drawn from his silence or his conduct in this case, which generally may in that of a conversation in his presence; and as it is only for the sake of these inferences that the conversation can be admitted, I think it better to refuse the evidence now offered.' (c)

Deposition of witness on a charge of felony.

But where to an action for false imprisonment the defendant pleaded that the plaintiff had been guilty of embezzlement, and it appeared that the depositions of the plaintiff and his witnesses had been taken on that charge in the presence of the plaintiff before a magistrate, and that the plaintiff had then said, 'I submit that there is no case against me;' Lord Denman, C. J., held that the depositions must be read, and the plaintiff's answer to them; but that the depositions were not any evidence of that which was stated in them, except in so much as the plaintiff had admitted them to be true by anything that he had said. (d)

(z) *Rex v. Appleby*, 3 Stark. N. P. C. 33. In an action of assault, the defendant offered evidence of what was said by the magistrate before whom the matter had been investigated, in the presence of both plaintiff and defendant; but Best, C. J., refused to admit it. *Child v. Grace*, 2 C. & P. 193.

(a) As to when the declarations of one conspirator are evidence against all his comrades, see *ante*, p. 143.

(b) *Rex v. Turner*, R. & M. C. C. R. 347. *Reg. v. Swinnerton*, C. & M. 593.

(c) *Melen v. Andrews*, M. & M. 336. See *Finden v. Westlake*, *ibid.* 461, per Tindal, C. J., and see *Child v. Grace*, *supra*.

(d) *Jones v. Morrell*, 1 C. & K. 266; and in *Simpson v. Robinson*, 15 Q. B. 511, Lord Denman, C. J., speaking of *Melen v. Andrews*, *supra*, said, 'We do not understand that case as deciding that



But if a prisoner in his examination before a magistrate makes an express reference to the examination of another prisoner, taken in his presence before the magistrate, the examination of such prisoner may be given in evidence against the prisoner so referring to it. (e) If a prisoner, when before a magistrate on a charge of an assault, makes a statement in answer to what the person charging him with the assault stated, the statement made by such party and the answer of the prisoner to it are admissible. Upon an indictment for murder, it appeared that the deceased made a complaint to a magistrate of the prisoner having struck him a blow (which ultimately occasioned his death), and the prisoner was in consequence brought before two magistrates for the assault, and convicted and fined. On the examination of the charge of assault the deceased made a statement, and the prisoner made a statement in answer to it. (f) Tindal, C. J., held that evidence of what was said by the deceased on the examination, and also what the prisoner said in answer, was admissible; but added, 'I shall not hold that what the deceased said is evidence as proving the facts he stated, as it would be if it were a deposition taken under the 7 Geo. 4, c. 64, but only evidence as producing an answer from the prisoner, like any other conversation; and I do not think it is the less evidence because it is on oath. I shall therefore admit it as a conversation.' (g)

*Secus*, if referred to by the prisoner.

And so if one prisoner were to make a confession in the presence of another prisoner, when not before a magistrate, such confession would be admissible against the prisoner in whose presence it was

Confession in the hearing of a prisoner not before a magistrate.

under no circumstances can such evidence be admitted; though the learned judge thought it in that case safer and better to exclude it, and the plaintiff's counsel acquiesced; for cases might certainly be conceived in which a party, by not denying a charge so made, might possibly afford strong proof that the imputation was just.'

(e) Several instances have occurred where this has been done, and the case is similar to *Rex v. John*, 7 C. & P. 324, and *Dennis's case*, 2 Lew. 261, where the prisoners' examinations referred to the depositions of particular witnesses, and such depositions were held to be admissible in explanation of the prisoner's statement. In such a case it should seem that it would depend on the manner in which the reference was made to the other prisoner's examination whether the facts stated in such examination were admitted or not. It might be that the prisoner's examination stated that the other prisoner's statement was correct, and if so that would be an admission of the facts stated in it; or the reference might be such as merely to require the reading of the other examination as explanatory of the prisoner's statement, without admitting any fact stated in it. In 2 Stark. Ev. 40, it is said, 'In some instances the confession of one taken in the presence and hearing of another prisoner may be very material to explain

the expressions and conduct of the latter upon that occasion; for any declarations of his, by which he assented to what was confessed by another to his own prejudice, would be admissible against him. The confession of the other may also, it seems, be evidence for the purpose of explaining such declarations.' C. S. G.

(f) This statement was not in writing, and objected to on that ground; but Tindal, C. J., held that, 'this being a summary conviction, is not a case in which magistrates are required to take down the evidence in writing.' And see *Robinson v. Vaughton*, 8 C. & P. 252, S. P.

(g) *Rex v. Edmunds*, 6 C. & P. 164. This decision has been doubted, 1 Phill. Ev. 400, and Joy, 79, 80, but as it should seem without any sufficient reason. The decision is precisely in conformity with the distinction taken by Best, C. J., in *Child v. Grace*, 2 C. & P. 193, *ante*, note (2), p. 486, and it is conceived that the evidence was admissible on the ground that at common law evidence of a deceased witness given upon oath in a judicial proceeding between the same parties is admissible in a subsequent proceeding, the party against whom the evidence is offered having had an opportunity to cross-examine in the former proceeding. See *Rex v. Carpenter*, 2 Show. 47, and the cases cited, *ante*, p. 354. C. S. G.

made, although he made no observation with reference to it ; for a confession may be collected or inferred from the conduct and demeanor of a prisoner on hearing a statement affecting himself. (*h*) But as such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution (*i*)

Statement made in the presence of a prisoner by his wife.

Not only what is said by a prisoner, but what is said to him, or in his presence, except when before a magistrate, is admissible in evidence, and it makes no difference that what was said was said by a person who cannot be called as a witness. On an indictment for murder, some observations made to the prisoner by his wife, to which he made an evasive reply, were about to be stated, when it was objected that the statement ought not to be made, as the wife, if she could by law be examined, would give a direct contradiction to them ; but Gaselee, J., and Parke, J., were both of opinion that the statement might be made to the jury ; and that the circumstance of the observations being stated to have been made by the wife, who could not be called as a witness, did not vary the general rule, that whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, was receivable as an implied admission on his part. (*j*) So where the wife of the prisoner, who was indicted for the murder of his wife's mother, came into the room where he was in custody, and said to him, ' Oh, Bartlett ! how could you do it ? ' He looked steadfastly at her, and said, ' Ah, what ! you accuse me of the murder too ? ' She said, ' I do, Bartlett ; you are the man that shot my mother.' The prisoner did not make any reply. She then turned to the witness and said, ' This was done for money.' It was objected, that as the wife could not be examined on oath, what she had then said could not be used as evidence against him ; but the evidence was held clearly admissible. (*k*)

By thief in presence of receiver.

So the confession of a thief made to a constable in the presence of the receiver is evidence against the latter that the property was stolen by the thief. (*l*)

Statement to prisoner denied by him.

A prisoner indicted for arson had given certain false accounts, as that he had seen the fire from his bedroom window, and had got up to see it ; and it was proposed to prove that the prisoner had said to his mother, ' You know I was at home ; ' on which she said, ' What's the use of denying it ? ' but it was objected that it would have the effect, in an indirect way, of giving evidence that the prisoner was not at home on the night in question ; which ought to be proved by calling the mother. Martin, B., thought the evidence not admissible ; for what was said in the presence of the prisoner was only admissible against him when admitted, whereas here it was denied by him. (*m*)

(*h*) 1 Phill. Ev. 400.

(*i*) Ibid.

(*j*) Rex v. Smithies, 5 C. & P. 332.

(*k*) Rex v. Bartlett, 7 C. & P. 832.

See Rex v. Simons, 6 C. & P. 540, where Alderson, B., held that what a person is overheard saying to his wife, or even saying to himself, is evidence against him.

(*l*) Reg. v. Cox, 1 F. & F. 90. Crowder, J.

(*m*) Reg. v. Welsh, 3 F. & F. 275.

The very ground of the objection shows that the evidence ought to have been admitted. Instead of being a statement made by the mother and denied by the prisoner, it was an assertion by the prisoner denied by the mother, which is a

On an indictment for rape it has been held that what had been said by a relative of the prosecutrix to a relative of the prisoner in the presence of the prosecutrix about making it up is admissible in favour of the prisoner. (*n*)

Statement in the presence of a prosecutrix.

A statement made in the hearing of a person, though not in his actual presence, may be evidence against him. Thus it has been held that, where the plaintiff was in the kitchen of the defendant's house, and the defendant's wife stood at the head of the kitchen stairs, what she there said in a tone of voice loud enough for the plaintiff to hear was admissible against the plaintiff. (*o*)

Statement in the hearing of a person.

The Court will not exclude a statement made in the prisoner's presence by another party to a third person, merely because some inducement has been held out to that party to make it; but very little weight ought to be attached to the fact of no answer being given to such statement by the prisoner, as he would not know whether it would be better for him to be silent or not. (*p*)

On an information for a libel, a book containing imputations identical with those in the libel, which had been published some time previously to the application for the information, is not admissible for the purpose of showing that the prosecutor had tacitly acquiesced in the truth of the identical charges contained in the libel. (*q*)

Previous publications of the same libel.

Where on a trial for murder a statement by a prisoner to a policeman on a charge of robbing the deceased with violence was tendered; it was objected that it was on another charge, before the charge of murder. Pollock, C. B., 'That makes no difference; whatever a man says is evidence against him—in criminal cases as well as civil—at any time and on any matter. A policeman apprehends a man on a charge of highway robbery on a particular night, and he says, I cannot be guilty of that robbery, for on the same night and the same hour I was at a different place; and the policeman may, on that admission, apprehend him on a charge of murder at the time and place so mentioned, and may offer that admission in evidence against him at the trial.' (*r*)

Any statement of a prisoner is admissible, though it relate to an offence different from that with which he is charged.

Upon an indictment for burglary, it appeared that, shortly after the robbery, three glass jars containing sweetmeats, which had been taken from the prosecutor's, were found in the prisoner's house, not being in any way concealed, and the prisoner's counsel urged that this was consistent with the account the prisoner had, as he was instructed, given of the way in which the jars had come into

A statement by a prisoner as to stolen property in his possession before any suspicion against him,

totally different thing, especially as no reply was made to what the mother said. It has been the constant practice to prove statements made by prisoners in the presence of persons who have denied them. C. S. G.

(*n*) Reg. v. Arnall, 8 Cox, C. C. 439. Martin, B., said, 'In a civil case, what is said in the presence of either of the parties is admissible against him; because it is open to the party so present to express assent or objection to what is said, and that would be admissible against him. In criminal cases the prosecutor, although not in strict law a party to the case, is so in fact, and I think that the rule applicable to conversation in the

presence of a party in a civil case might be fairly extended to a conversation in the presence of the prosecutor in a criminal case.' Such a statement as to making up the matter would tend to affect the credit of the prosecutrix in a case of rape; and its admissibility may be more satisfactorily rested upon that ground, but she ought to have been cross-examined as to it in the first instance. C. S. G.

(*o*) Neile v. Jakle, 2 C. & K. 709. Maule, J.

(*p*) R. v. Milton, 10 Cox, C. C. 364.

(*q*) Reg. v. Newman, 1 E. & B. 268.

(*r*) Reg. v. Lee, 4 F. & F. 63. See Fisher v. Bonfils, 12 C. B. 762 per Maule, J.

is said to be admissible for him.

his possession ; namely, that the prisoner had found them in a field. But no one was called to prove this statement. Alderson, B., told the jury that, if it had appeared that, before suspicion attached to the prisoner, he had given this account of the possession of the property to his neighbours, the property being there at the time, and before search made, he had not the slightest doubt that, *valeat quantum*, this would have been very competent evidence for the prisoner. (s)

Declarations unconnected with the acts charged as an offence are inadmissible in favour of a prisoner.

Upon an indictment for burning bibles, it was proposed to prove, on the part of the defendant, that he had preached sermons relating to immoral publications previously to the alleged offence, and it was urged that it was a material part of the charge that the defendant had knowingly caused the bibles to be burnt, and therefore for the purpose of showing his intention in getting books together, his directions given in the sermons to the persons who brought in the books were admissible ; but it was held that the evidence could not be given. It was true that declarations accompanying acts are admissible to show the intention at the time ; and the question of intention was a very material one in the case ; but it was to be inferred from legal evidence of facts, and not from declarations of the defendant on former occasions unconnected with the subject-matter of the trial. (t)

Acts and declarations of co-conspirators and of agents.

As analogous to the former part of this section, concerning admissions and confessions by the defendant himself, it may be proper in this place to mention the subject of acts and declarations of co-conspirators and of agents. How far the acts and words of one conspirator are evidence against the others, has already been mentioned in a former part of this work. (u) With respect to the statements and acts of agents, it was decided, on the impeachment of Lord Melville, by the House of Lords, that a receipt given in the regular and official form by Mr. Douglas (who, it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of treasurer of the navy, and to receive all necessary sums of money, and to sign receipts for the same), was admissible in evidence against Lord Melville, to establish this single fact, that a person appointed by him, as his paymaster, did receive from the Exchequer a certain sum of money in the ordinary course of business. (v) In the *Queen's case*, (w) it was said by Abbott, C. J., in delivering the opinion of the judges, that it would not be allowable on the part of the prosecution to give evidence that an agent, who had been proved to have been employed by the defendant to procure evidence for the defence, but who had not been examined as a witness, offered a bribe to some third person, who also had not been examined. This was not the question proposed by the House of Lords to the judges, but the converse of it, considered by the chief justice, for the purpose of showing the grounds of the

Agent of defendant.

(s) Reg. v. Abraham, 2 C. & K. 550. I never have been able to discover any ground for this *obiter dictum*. Such a statement is not one accompanying an act ; it is a mere declaration, and, instead of being against the interest of the prisoner, it is directly in his favour, supposing the goods to have been stolen.

C. S. G.

(t) Reg. v. Petcherini, 7 Cox, C. C. 79, Crampton, J., and Greene, B.

(u) *Ante*, p. 143. See also 2 Stark. Ev. tit. *Conspiracy*.

(v) 29 How. St. Tr. 746. 1 Phill. Ev. 386.

(w) 2 Brod. & Bing. 302.

determination of the judges. The actual question proposed for their consideration was, as to the competency of proving, on the trial of a criminal prosecution, certain acts supposed to have been done by the agent of the *prosecutor*. And they determined that similar proof, as to the conduct of the prosecutor's agent in offering a bribe, was inadmissible. The question, the Lord Chief Justice observed, regarded the act of an agent addressed to a person not examined as a witness in support of the indictment, the proffered proof not apparently connecting itself with any particular matter deposed by the witnesses, who had been examined in support of the indictment, and leaving therefore those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion. His lordship concluded by observing that, notwithstanding the opinion he had delivered, he was by no means prepared to say, that in no case, and under no circumstances appearing at a trial, it might not be fit and proper for a judge to allow proof of this nature, to be submitted for the consideration of a jury; and that the inclination of every judge was to admit, rather than exclude, the proffered proof.

Agent of prosecutor.

There are sundry instances where an employer is criminally responsible for acts done by his agents or servants, in the course of their employment and for his benefit. Thus a master has been held criminally responsible for the sale by his servant, in the course of his employment, of bread containing a noxious quantity of alum. (*y*)

Acts of servants.

(*i*). *Proof of Confessions and Statements. When Onus on Prosecutor to contradict same.*

As to proof of statements made by the accused before the committing magistrates, see the next section of this chapter.

Where a confession is tendered in evidence, the proof that it was made voluntarily lies upon the prosecutor; and if it be left in doubt whether the confession were made in consequence of an inducement, it will be rejected. (*z*)

It lies on the prosecution to prove that a statement by a prisoner was voluntary.

A prisoner made a confession to an officer, who left the prisoner, and afterwards wrote down from recollection what the prisoner said to him. What the officer wrote was read over to the prisoner before the committing magistrate, and he said that what had been read over to him was the truth, and signed the paper. Best, J., 'We have not the confession of the prisoner; we have only the officer's recollection of it, put into writing when the prisoner was not present, and in the language of the officer, and not in the words used by the prisoner. If a confession be not taken in writing, we must be content with the recollection of the witness who proves it, because we cannot have any more certain account of it. I will receive nothing as a confession in writing that was not taken down from the mouth of the prisoner in his own words, nothing that he says that has any relation to the subject being omitted, nor anything added, except explanations of provincial expressions or terms of art. The reading this paper to the prisoner, and his

Examinations not in the words of the prisoners are inadmissible.

(*y*) *Rex v. Dixon*, 3 M. & S. 11, vol. 1, p. 263, and see other cases there cited. (*z*) *Rex v. Wingham*, 2 Den. C. C. 447, note.

acknowledgment that it was correct, does not remove the objection. By the change of language a very different complexion might be given to the story from what it had when it came from the mouth of the prisoner, and which he might not discover when it was read over to him. The lower orders of men have but few words to convey their meaning, and they know as little of expressions that they are not in the habit of using as if they belonged to another language. I will not receive this paper in evidence. (a) In the same case it is said that Dallas, C. J., had refused to receive, at a former assizes, a confession, because it was not in the prisoner's own words. So where it was proved that the examination of the prisoner before the magistrate was read over to her, and that she signed it, but there was no evidence that it was taken down from what she said or in the words she used, and in fact it was in language clearly not such as she was likely to have used; Littledale, J., refused to permit it to be read. (b) And where a witness having, in her examination before the coroner, stated that she had slept with the prisoner, that he had given her two black eyes, that they had seen a placard, &c., the statement of the prisoner before the coroner was tendered in evidence, and was as follows:—'Prisoner admits sleeping with the witness, blackening her eyes, seeing the placard,' &c.: and it was objected that the examination was taken in the third person, which was not complying with the statute, and did not purport to be the language of the prisoner at all, but merely the coroner's expression of what he considered the prisoner to mean. The jury were to judge of the effect of the statement, and they could not do that without having before them the very words in which it had been made. Lord Denman, C. J., thought the objection of considerable importance. As to the mode of taking the examination of the prisoner, that was a very improper way in which to do it. His lordship did not, however, see how he could exclude the evidence, but he should reserve the point, in case it were necessary. (c)

Where the confession of a prisoner mentions the name of another prisoner tried at the same time, it seems, according to the later cases, that the whole of the confession, whether by parol or in writing, must be given in evidence. The judge will, however, in such cases, direct the jury that the confession is only to be taken as evidence against the prisoner who made it. On the Oxford Circuit it was the constant practice some years ago to omit the name of any prisoner that was mentioned in the confession of another prisoner. (d) But it has been held in many cases on that circuit (e)

(a) *Rex v. Sexton*, 1 Burn's J., Doyl. & Wms. p. 1086. As the paper was read to the prisoner, and he acknowledged that it was correct, it was evidence.

(b) *Rex v. Mallet*, Gloucester Spr. Ass. 1830, MSS. C. S. G. But see *post*.

(c) *Reg. v. Roche*, C. & M. 341. Verdict, Not guilty.

(d) See *Rex v. Fletcher*, 4 C. & P. 250. *Rex v. Limer*, Stafford Sum. Ass. 1839, Bosanquet, J. MSS. C. S. G.

(e) *Rex v. Hearne*, 4 C. & P. 215. Littledale, J. *Rex v. Clower*, *ibid.* 221.

*Rex v. Daniel and Garland*, Monmouth Spr. Ass. 1831, MSS. C. S. G. Bosanquet, J., saying, 'The ground I go upon is, that I do not think I am authorized to direct the officer to read one word instead of another. I cannot tell the officer to read what is not written.' In *Rex v. Giles and Betts*, Worcester Spr. Ass. 1830, MSS. C. S. G., where there was a parol confession, Littledale, J., said, 'he was satisfied the proper way was to state the names uttered by the prisoner; as to state "another person" instead of the

All names in the confession must be mentioned.

and elsewhere, (*f*) that the proper course is to state or read all the names mentioned by the prisoner in his confession. A learned judge has, however, expressed on several occasions a strong opinion that such a course is unfair. (*g*) If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with a witness, be brought forward, the defendant has a right to lay before the court the whole of what was said in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter, not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. (*h*) But it seems that proof of a detached statement made by a party does not authorize proof by that party of all that he said at that time, but only of so much as can be in some way connected with the statement proved. (*i*) It seems at one time to have been considered that, if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced must be taken as true. (*j*) But the correctness of this position was doubted, (*k*) and it is now settled that the whole of the prisoner's statement must be taken into consideration by the jury, who are not bound to take what he has said in his favour to be true, because it is given in evidence by

The whole of a confession or admission must be stated.

The jury are to give such credit to any statement in it in favour of the prisoner as they think fit.

name used was not to state the truth, which a witness was sworn to do.' In *Rex v. Harding, Bailey, and Shumer*, Gloucester Spr. Ass. 1830, MSS. C. S. G., where there was a written confession, Littledale, J., said, 'Suppose two men are indicted, one as principal, and the other as accessory, and the principal is named in the indictment, and the accessory makes a confession admitting himself to be accessory to the principal, how is it to be known that he is accessory to such principal, if the name of the principal is not to be read? I have considered this case very much indeed, and I am most clearly of opinion that it is to be read as the prisoner made it, because otherwise the evidence is not read as it was given by the prisoner. I have no doubt upon it, and will not therefore reserve the point.' *Rex v. Walkley*, 6 C. & P. 175, Gurney, B.

(*f*) *Rex v. Fletcher*, 4 C. & P. 250, Littledale, J., at York, S. C. 1 Lew. 107. Hall's case, 1 Lew. 110, Alderson, B., at Appleby. Forster's case, 1 Lew. 110. Lord Denman, C. J., at Carlisle. *Rex v. Fletcher*, *supra*, was the case of a letter written by one prisoner, and implicating another.

(*g*) Parke, B., in *Maudsley's case*, 1 Lew. 110, and *Barstow's case*, *ibid*. It would be extremely beneficial to prisoners in such cases to be tried separately, and

such a course is nothing more than expedient in cases of difficulty, as it is almost beyond the power of a jury properly to discriminate between the evidence affecting different prisoners. C. S. G.,

(*h*) By Abbott, C. J., in the Queen's case, 2 B. & B. 297.

(*i*) *Prince v. Samo*, 7 A. & E. 627. In this case a witness stated that the plaintiff, on the trial of an indictment, had proved that he had been remanded by the court for the relief of insolvent debtors; and it was held that the opposite counsel could not ask whether the plaintiff had not also, on the same trial, said that an advance was a gift and not a loan; and the court said that the dictum of Lord Tenterden, *supra*, was extrajudicial.

(*j*) By Bosanquet, Serjt., in *Rex v. Jones*, 2 C. & P. 630. So where the prisoner was indicted for a larceny, and in addition to evidence of the possession of the stolen goods, the counsel for the prosecution put in the prisoner's statement made before the magistrate, in which the prisoner asserted that he had bought the goods; Garrow, B., directed an acquittal, saying that if a prosecutor used a prisoner's statement he must take the whole of it together. *Ibid*.

(*k*) By Park, J. A. J., in *Rex v. Lloyd*, Worcester Ass. Ass. 1830, MSS. C. S. G., and 1 Phil. Ev. 399.

the prosecutor, but are to weigh it, with all the circumstances of the case, and determine whether they believe it or not. (*l*) The jury may, therefore, believe one part of the prisoner's statement and disbelieve another. (*m*) They may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. (*n*) In determining whether the statement be true or not, the jury should consider whether it be probable or improbable in itself, and whether it be consistent or inconsistent with the other circumstances of the case. (*o*) If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case. (*p*) But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, precisely as in any other case, where one part of the evidence is contradictory to another. (*q*)

Where a person, in whose possession stolen property is found, gives a reasonable account of how he came by it, naming a known person from whom he received it, the prosecution should negative that account.

The prisoner was indicted for stealing a piece of wood, and it appeared that on the piece of wood being found by a police constable in the prisoner's shop, about five days after it was lost, he stated that he bought it from a person named Nash who lived about two miles off. Nash was not produced as a witness for the prosecution, and the prisoner did not call any witness. Alderson, B., in summing up, said, 'In cases of this nature you should take it as a general principle that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecution to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing his watch, and I were to say I bought it from a particular tradesman, whom I name, that is *prima facie* a reasonable account, and I ought not to be convicted of felony unless it is shown that that account is a false one.' (*r*)

(*l*) *Rex v. Clewes*, 4 C. & P. 221, Littledale, J. *Rex v. Steptoe*, 4 C. & P. 397. *Rex v. Higgins*, 3 C. & P. 603, Parke, J. *Rex v. Jones*, Monmouth Sum. Ass. 1830, MSS. C. S. G., Park, J. A. J. *Rex v. Locker*, Stafford Spr. Ass. 1831. *Patteson*, J. MSS. C. S. G.

(*m*) 1 Phill. Ev. 399.

(*n*) Greenl. Ev. 253, citing *Rex v. Steptoe*, *supra*. *Rex v. Clewes*, *supra*. *Rex v. Higgins*, *supra*, and *Respublica v. M'Carty*, 2 Dall. 86, 88.

(*o*) *Rex v. Steptoe*, *supra*. *Rex v. Jones*, *supra*.

(*p*) Greenl. Ev. 253.

(*q*) *Rex v. Jones*, 2 C. & P. 630. So in a civil case, if a person says, 'that he did owe a debt, but that he had paid it,' such an admission would not be received as evidence to prove the debt, without

being also evidence of the payment. Per Hale, C. J. Anonymous case, cited 12 Vin. Abr. tit. Ev. A. 23. What he has said in his own favour may perhaps weigh very little with the jury, while his admission against himself may be conclusive; however, it is reasonable that if any part of his statement is admitted in evidence, the whole should be admitted. 1 Phill. Ev. 399. See also *Smith v. Blandy*, R. & M. N. P. C. 257. *Rose v. Savory*, 2 B. N. C. 145.

(*r*) *Reg. v. Crowhurst*, 1 C. & K. 370. In *Reg. v. Smith*, 2 C. & K. 207, Lord Denman, C. J., said, 'I quite agree with *Reg. v. Crowhurst*, which is very correctly reported. It was mentioned to me by Alderson, B., when it occurred.' And Lord Denman added that in a similar case the magistrate should send for and



The prisoner was indicted for stealing a gun, which was found in his possession, and when taken into custody he stated to a policeman that he had bought the gun on the road from a tally-man for ten shillings and a gallon of beer; but when before the magistrate he stated that Heath, Randall, and himself had found the gun hidden in a hayrick, and that he had given them a shilling each and a pot of beer, and had taken possession of the gun. It was urged that Heath and Randall ought to be called for the prosecution, and *Reg. v. Crowhurst* and *Reg. v. Smith* (s) were cited; but Platt, B., held that this case was very different from those cited. Here the prisoner had given two totally different accounts of the way in which he came possessed of the gun; and it certainly could not be incumbent on the prosecutor to call persons whom the prisoner had referred to in one of two contradictory statements. (t)

Where it appeared that certain cloth had been cut and carried away from a church, and a knife, which was proved to belong to the prisoner, found on the floor of the church, and in the prisoner's house several remnants of cloth were found, which corresponded with the pieces still remaining in the church, and the prisoner being charged with the offence said he knew nothing of it, and had bought the cloth of one Lake, who lived a mile off; it was contended on the authority of *Reg. v. Crowhurst* (u) that the prosecutor was bound to call Lake as a witness. It was held, however, that that was not so; because the discovery of the prisoner's knife in the church went to show that he himself was the thief, and therefore that the account he had so given was either not true, or not likely to be so. The prisoner, therefore, was properly left to reconcile the finding of his knife with his innocence, by showing from Lake that he had come honestly by the cloth notwithstanding that fact; the rule on this matter being that the prosecutor was not bound to call persons named by the prisoner, unless his account was evidently true, or there was good reason to believe it to be true till it was contradicted. Here there was no such reason, as the facts were at variance with the story; but still the story might be true, and it was for the prisoner to make out its truth by calling the man from whom he bought the stolen property. (v)

Upon an indictment against the prisoner for stealing and receiving two waistcoats and two pairs of trousers, it appeared that the articles were stolen on the 2nd of November, and that they were sold by the prisoner for twelve shillings in a public-house openly, without attempt at concealment, on the 4th of November, when about thirty persons were in the room. To the constable, who charged him with the felony, the prisoner said, 'Cocking and Derby

Where the prisoner gives two contradictory accounts of how he became possessed of property, it is not incumbent on the prosecutor to contradict either of them.

Unless there be good reason to believe the prisoner's statement to be true, the prosecutor need not contradict it.

Where a prisoner openly sold stolen property, and named the persons from whom he received it as soon as charged

examine the person mentioned, as he might either exonerate the prisoner or prove his statement to be false. See also *Reg. v. Evans*, 2 Cox, C. C. 270, vol. 2, p. 279, as to the improbabilities of a prisoner's statement.

(s) *Supra.*

(t) *Reg. v. Dibley*, 2 C. & K. 818. Platt, B., added, 'I think it might be prudent in the prosecutor to have the wit-

nesses in attendance, though he does not call them, to avoid the effect of the observation by the prisoner's counsel that those persons could have substantiated the prisoner's defence, but that he was too poor to procure their attendance.'

(u) *Supra.*

(v) *Reg. v. Harmer*, 2 Cox, C. C. 487,

with the offence, it was held that there was *some* evidence for the jury, though those persons were not called.

brought them to my house, and the woman who keeps my house (Mrs. Wilson) will say so, and I, being on the spree, sold them and spent the money.' In consequence of this statement Cocking and Derby were apprehended, and the former convicted of stealing articles taken at the same time from the prosecutor's house; but Derby was discharged for want of evidence. The constable went to Mrs. Wilson, and made inquiries as to the prisoner's statement, but no evidence of what transpired on those inquiries was received. It was urged that, as the prisoner had stated how he came into possession of the articles, and had mentioned the names of real persons from whom he had received them, it was incumbent on the prosecution to negative his statement if false, by calling Cocking, Derby, and Mrs. Wilson; but the sessions overruled the objection, and the prisoner was convicted of stealing; and, upon a case reserved upon the question whether, under the circumstances of the case, which rested solely on a recent possession of the stolen goods, it lay on the prosecution to call the persons to whom the prisoner referred, or some of them, to account for his possession, it was held that there was evidence for the jury, upon which the prisoner might be convicted; but Pollock, C. B., said, 'I should be sorry that, upon such evidence, any prisoner should be convicted before me.' (*w*)

As to the mode of introducing confessions in evidence.

For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made. (*x*) In a trial for murder, it was proposed to give in evidence a statement of the prisoner, made in prison to a coroner, for whom the prisoner had sent. It however appeared that, previous to this time, Mr. Clifton, a magistrate, had had an interview with the prisoner, and it was suggested, on behalf of the prisoner, that he might have told the prisoner that it would be better to confess, and that, therefore, the counsel for the prosecution were bound to call him. Littledale, J., 'As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses.' (*y*) So where a prisoner being in the custody of two constables on a charge of arson, one Bullock went into the room, and the prisoner immediately asked him to go into another room, as he wished to speak to him, and they went into another room, when the prisoner made a statement; it was urged that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess. It was evident that the prisoner acted under some influence, as he first proposed going into another room: and *Rex v. Swatkins* (*z*) was relied upon. Taunton, J., 'A

(*w*) *Reg. v. Wilson*, D. & B. 157. The chairman told the jury that the constable having made inquiries which satisfied him (but the case does not state this), it was not necessary for the prosecution to call the persons to whom the prisoner referred. On the contrary, however, it would rather seem that the fact that the constable did not think the persons named should be called for the prosecution, affords an in-

ference that they would have supported the prisoner's statement. C. S. G.

(*x*) 1 Phill. Ev. 409.

(*y*) *Rex v. Clewes*, 4 C. & P. 221. The counsel for the prosecution declined to call Mr. Clifton, and he was called and examined by the prisoner's counsel. See this case, *ante*, p. 494.

(*z*) *Infra*.

confession is presumed to be voluntary unless the contrary is shown; and as no threat or promise is proved to have been made by the constables, it is not to be presumed.' Having consulted Littledale, J., his lordship added, 'We do not think according to the usual practice that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement; otherwise we must in all cases call the magistrates and constables, before whom or in whose custody the prisoner has been.' (a)

But if there be any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such suspicion ought to be removed, in the first instance, by the prosecutor calling such officer. Upon an indictment for arson, it appeared that a constable, who was called to prove a confession, went into a room in an inn, where he found the prisoner in the custody of another constable, and as soon as he went into the room, the prisoner said he wished to speak to him, and motioned the constable to leave the room, which he did, and left them alone. The prisoner immediately made a statement. The witness had not cautioned the prisoner at all, and nothing had been said of what had passed between the constable and the prisoner before the witness entered the room. It was contended that the other constable must be called to show that he had used no inducement to make the prisoner confess. Patteson, J., 'I am inclined to think the constable ought to be called. This is a peculiar case, and can never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away. I think, as the witness did not caution the prisoner, it would be unsafe to receive the statement. It would lead to collusion between constables.' (b)

In order to induce the Court to call another officer in whose custody the prisoner had been, it must appear either that some inducement had been used, or some express reference made to such officer. A prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to a confession which he had previously made to Williams, a constable; it was submitted that Williams ought to be called to prove that he had not used any inducement. Littledale, J., 'Although I do not think it necessary that a constable, in whose custody a prisoner has been, should be called in every case, yet as in this case there is a reference to the constable, I think he ought to be called.' Williams was then called, and proved that he did not use any undue means to obtain a confession: but he had received the prisoner from Marsh, another

If there be any probable ground to suspect that an officer has improperly obtained a confession, such officer ought to be called.

It must appear either that some inducement has been used, or some express reference must be made to an officer, in order to make it incumbent on the prosecutor to call such officer.

(a) *Rex v. Williams*, Gloucester Spr. Ass. 1832, MSS. C. S. G. The statement was rejected on another ground. See *ante*, p. 458.

(b) *Rex v. Swatkins*, 4 C. & P. 548, and MSS. C. S. G. It afterwards appeared that the prisoner had gone voluntarily before the magistrates at the inn, and then ran away, was brought back by the constable, and detained by him in

the room for the purpose of being a witness, and that he was not charged with the offence till after the statement was made. Patteson, J., 'If he was not under any charge, that varies the case. As he was at that time attending as a witness, and was not in custody on any charge, I shall receive the statement in evidence without putting the prosecutor to call the other constable.'

constable, and the prisoner had made some statement to Marsh. It was then urged that Marsh should be called. Littledale, J., 'I do not think it is necessary that a constable should be called, unless it appear that some promise was given, or some express reference was made to the constable. There was a distinct reference made to Williams, and therefore I thought he must be called; but there is no reference to Marsh. It does not appear either that any confession was made to Marsh. It only appears that a statement was made; that might be either a confession, a denial, or an exculpation.' (c)

Where a confession has been rightly received on a trial in the first instance, and it is afterwards shown that it was unduly obtained, and yet such confession is left to the jury, the conviction of the prisoner cannot be supported.

Upon an indictment for administering poison with intent to murder, it appeared that the prisoner had given her mistress some milk, in which a quantity of fag water had been mixed. Fag water is a mixture of arsenic, soft soap, and water, used for dressing sheep. In order to prove that the prisoner had put the fag water in the milk, that she knew the nature of it, and intended to murder her mistress, her own confession to Mr. Gilby, a medical man, made in the presence of the prisoner's mistress and her husband, was offered in evidence. Gilby swore that he did not tell the prisoner that it would be better or worse for her to tell; that he used no threats or promises, nor did any one else: before Gilby's arrival the prisoner had not made any confession, nor had any threats or promises been held out to her. Patteson, J., admitted the prisoner's statement to Gilby, who said, 'I asked her if she had given the woman anything in her milk; she said she had mixed fag water with the milk; she had put in half a teacupful. I asked her if she was aware of the nature of it; she said she knew it was poison; she thought it would kill the woman; she had done it to be released from her service.' A woman was then called who was present at this conversation, and she swore that Gilby told the prisoner in the presence of her mistress and her husband, that it would be better for her to speak the truth. She could not tell whether he had told her so before he asked her what she had done; but it was before she answered. Gilby, being recalled, said, 'I could not positively swear that I did not tell the prisoner that it would be better for her to tell the truth; I don't recollect that I did. It is very likely I might tell her it would be better for her to tell the truth.' The counsel for the prisoner contended that the confession ought to be struck out of the judge's notes, and not submitted to the jury; but after consulting Lord Denman, C. J., Patteson, J., declined to strike out the evidence of the confession, and put the whole to the jury, feeling that it was impossible, after they had heard the confession, to expect that they could weigh and consider the other facts in the case without reference to the confession; and in truth those other facts

(c) *Rex v. Warner and Morgan*, Gloucester Spr. Ass. 1832, MSS. C. S. G. The prisoner's counsel then proposed to call Marsh, which was objected to as not being at the proper time, but Littledale, J., said, 'It is much the more convenient time to do so. If it should afterwards turn out that the confessions were in consequence of what Marsh had said, they must all be struck out, but it would

be very difficult to do away with the impression they might have made on the mind of the jury.' Marsh was then called for the prisoner, and proved that when the prisoner was in his custody it was not for the offence for which he was then being tried. See this case, *ante*, p. 452. This case was tried at the same assizes as *Rex v. Williams*, *supra*, but after that case had been tried. C. S. G.

by themselves would not have warranted a conviction. The jury convicted, and upon a case reserved upon the question whether the right course had been pursued, Patteson, J., said, 'I think if it had appeared in the first instance that the medical man had used the words "it would be better for you to speak the truth," I should have excluded the evidence of the confession. The only question is, whether, when that evidence had been properly admitted, which was the case here, I ought to have struck it out of my notes, after proof that the confession was not voluntary. The prisoner was certainly bound to show that it was not so; but that being proved by the second witness, I think I should have treated the evidence of the confession as though it had been inadmissible in the first instance.' Pollock, C. B., 'We are all of opinion that the conviction cannot be sustained.' (*d*)

## SEC. II.

### *Statements of Accused before Magistrates.*

The cases in the foregoing section are applicable to confessions by prisoners generally; the subject of confessions, contained in the statements of prisoners before the committing magistrate, remains to be considered in the present section.

Examination of prisoner before magistrate.

- (a) Present enactments, p. 499.
- (b) Mode of taking prisoner's examination, p. 502.
- (c) Proof of statements. Impeaching same, p. 504.

#### (a) *Present Enactments.*

The 11 & 12 Vict. c. 42, (*e*) s. 34, repeals so much of the 7 Geo. 4, c. 64, 'as relates to the taking of bail in cases of felony, and to the taking of the *examinations and informations against persons charged with felonies and misdemeanors*, and binding persons by recognizance to prosecute or give evidence.' (*f*)

11 & 12 Vict. c. 42.

(*d*) Reg. v. Garner, 1 Den. C. C. 329, 2 C. & K. 926. All that is reported to have fallen from the judges on the point is stated, because in the marginal note in Den. C. C. it is stated to have been held, 'that although the confession was rightly admitted by the judge in the first instance, and taken down by him as evidence, it should be struck out of his notes after proof by the prisoner that it had been made under the above inducement.' It is plain that the decision only warrants the marginal note I have above inserted, especially as the evidence besides the confession would not have warranted a conviction, and therefore was not enough to go to the jury. The marginal note in C. & K. is equally erroneous. Where a jury have heard a confession proved, which afterwards turns out to have been improperly obtained, the prisoner can

hardly in any case be *fairly* tried, however much the judge may endeavour to induce the jury to throw the confession out of their consideration, and it deserves consideration whether, in order to prevent the injury that might thus arise to a prisoner, the judge would not be well warranted in discharging the jury, in order that the prisoner might be tried by another jury. Newton's case, 13 Q. B. 716. It might be well in such a case to ask the prisoner, whether he wished the jury to be discharged on that ground, and to discharge the jury upon his desiring it. C. S. G.

(*e*) The Irish Act, 12 & 13 Vict. c. 69, is similar to this enactment, and repeals 9 Geo. 4, c. 54, ss. 2 & 3. The 12 & 13 Vict. c. 69, is repealed by 14 & 15

(*f*) The 7 Geo. 4, c. 64, repealed prior

The 11 & 12  
Vict. c. 42,  
s. 1, gives  
justices juris-  
diction over  
all indictable  
offences.

Examination  
of witnesses.

Sec. 1, gives jurisdiction to magistrates over 'any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever,' and provides for the mode of bringing any person, who has committed, or is suspected of having committed, any such offence, before a justice; and by sec. 17 enacts that 'in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (M.) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; (g) and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, (h) by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.' (i)

After exami-  
nation of the  
witnesses  
justice to read  
their deposi-  
tions to the  
accused and  
caution him as  
to any state-

Sec. 18. 'After the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace, or one of the justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having

enactments, 1 & 2 P. & M. c. 13, s. 4, and 2 & 3 P. & M. c. 10. These two last-mentioned statutes did not apply to misdemeanors or high treason. *Rex v. Paine*, 1 Salk. 281. S. C. 1 Lord Raym. 729, cited by Lord Kenyon in *Rex v. Eriswell*, 3 T. R. 723. 1 Hale, 306. See *Radbourne's case*, 1 Leach, 457. Sec. 4 of 7 Geo. 4, c. 64, prescribes the duty of coroners upon inquisitions in putting the evidence in writing and binding over the witnesses, but contains no provision

as to taking the examination of any person suspected of causing the death of any person on whose body the inquisition is held.

(g) See *post*, p. 520.

(h) See *Duke of Beaufort v. Crawshay*, 35 L. J. C. P. 342.

(i) The Irish Act, 14 & 15 Vict. c. 93, s. 14, No. 1, is similar to this clause; but omits the words 'or so ill as not to be able to travel.'

heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.), and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.'

ment he may make;

and inform him that he has nothing to hope or fear from either promise or threat.

(N). *'Statement of the Accused.'*

' : A. B. stands charged before the undersigned, [One] of Her Majesty's justices of the peace in and for the [county] aforesaid, this day of in the year of our Lord for that he the said A. B. on at [dc., as in the caption of the depositions]; and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" whereupon the said A. B. saith as follows:—

'[Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it if he will.]

'A. B.

'Taken before me at the day and year first above mentioned.' (k) 'J. S.'

By sec. 20, 'the several recognizances (of the prosecutor and witnesses), together with the information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any)

Depositions and statements of prisoners to be

(k) By sec. 28, 'the several forms in the schedule to this Act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law.'

returned to  
the court  
where the  
trial is to be.

in every such case, shall be delivered by the said justice or justices, or he or they shall cause the same to be delivered, to the proper officer of the court in which the trial is to be had, before or at the opening of the said court, on the first day of the sitting thereof, or at such other time as the judge, recorder, or justice, who is to preside in such court at the said trial, shall order and appoint.'

Observations  
on 11 & 12  
Vict. c. 42  
ss. 17 and 18.

An attentive perusal of the 18th section of this Act shows that, as far as it relates to what is to be done by the justice in cautioning the accused and taking down the statement, the clause is merely mandatory; it commands what shall be done, but it does not state what shall be the consequence, if any, of any neglect to comply with its directions. In this respect it is similar to the previous enactments, and under them it was settled that a non-compliance with their requirements did not exclude the proof of what the accused might have said before the magistrate; but that if the written examination were irregular, or no (*l*) written examination had been taken, the statement of the prisoner might be proved by any evidence which was applicable to such a state of things; and a similar construction has been put on the new clause. Whenever, therefore, a case occurs in which the provisions of the new clause have been so far neglected that the prisoner's statement cannot be admitted under that clause, the question will arise whether it is otherwise admissible.

There is a difference between sec. 17, relating to depositions, and sec. 18, relating to examinations of prisoners, which deserves notice. By sec. 17, if on the trial it is proved that a witness is dead or too ill to travel, and that the deposition was taken in the presence of the accused, and that there was a full opportunity for cross-examination, then '*if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof,*' unless it shall be proved that such justice did not sign it. But sec. 18 omits the words in italics. These words in all probability were omitted accidentally in this clause; and it seems that this is so, for the Irish Act, 12 & 13 Vict. c. 69, s. 18, after the words 'without further proof thereof,' inserts, 'if the same purport to be signed by the justice or justices by or before whom the same purports to have been taken.'

### (b) Mode of Taking Prisoner's Examination.

When and how  
the prisoner's  
examination  
should be  
taken.

The proper time for taking the examination of a prisoner had always been held to be after the witnesses have been examined, and he has heard what they have deposed against him; (*m*) and it is expressly made so by the new clause.

The cautions to be given by the magistrate are pointed out by the Act (*ante*, p. 500).

It ought to be left entirely to the accused whether he will make

(*l*) R. v. M'Dermott, 6 Cox, C. C. 479, cannot be supported. row, B. Rex v. Bell, 5 C. & P. 162.  
Rex v. Spilsbury, 7 C. & P. 187.

(*m*) Rex v. Fagg, 11 M. & W. 101.



any statement or not; he ought not to be dissuaded from making a perfectly voluntary confession, because that is to shut up one of the sources of justice.' (n) A prisoner is not to be entrapped into making any statement; but when a prisoner is willing to make a statement, it is the duty of the magistrates to receive it. (o)

It seems that a statement made by a prisoner in answer to a question put by the committing magistrate is admissible in evidence. (p) But, as a general rule, it seems that a magistrate ought only to put questions to a prisoner for the purpose of his explaining what he has said. But questions calculated to lead to answers prejudicial to the prisoner should not be asked; and the power should in every case be used with caution and discretion.

Magistrate putting questions to prisoner.

A prisoner indicted for murder was apprehended on that charge, and immediately taken before the magistrates. An appraiser took notes of what passed, but they were not signed by any one. The prisoner was asked one or two questions by the magistrates, to which he gave certain answers, after which he was remanded. It was objected that the magistrates had no right to put these questions; they were tied down by the 11 & 12 Vict. c. 42, ss. 17 & 18 to a particular mode of procedure. It was answered that this matter fell within the proviso in sec. 18. Wilde, C. J., refused to receive the evidence. If this sort of examination were received in evidence it was hard to say where it might stop. A person in custody, or in other imprisonment, questioned by a magistrate, who has power to commit him, and power to release him, might think himself bound to answer for fear of being sent to gaol. The mind in such a case would be likely to be affected by the very influences which render the statements of accused persons inadmissible. (q)

Where on the hearing before the magistrate on a charge either of the murder or concealing the birth of her child, after the prisoner had been cautioned in the usual manner, and had stated that she had nothing to say, the magistrate, before committing her, asked her where she had put the body; Erle, J., refused to allow the answer to be given. The question ought never to have been put, and it would be very unfair towards the prisoner to receive in evidence an answer so irregularly elicited. (r)

The examination of a prisoner ought to be taken down in his very words as nearly as possible. (s) Where, before the late Act, it appeared to be in language the prisoner did not use, it was not admitted in evidence against him. (t)

In what words the examinations should be taken.

The examination of a prisoner must not be taken upon oath. (u)

Not upon oath.

The examination of a prisoner, when reduced into writing,

Signing by the

(n) Per Gurney, B. *Rex v. Green*, 5 C. & P. 312.

(o) Reg. v. Arnold, 8 C. & P. 621. Lord Denman, C. J.

(p) See *Rex v. Jones*, Carr. Supp. 137, C. & P. 239 n. *R. v. Bartlett*, 7 C. & P. 832. *R. v. Rees*, 7 C. & P. 568. *R. v. Ellis*, R. & M. N. P. R. 432. But see *contra*, *R. v. Wilson*, Holt, N. P. C. 597.

(q) Reg. v. Pettit, 4 Cox, C. C. 164. In this case the proceedings of the magistrates were clearly irregular, as no

witness had been examined, &c.

(r) Reg. v. Berriman, 6 Cox, C. C. 388.

(s) See *ante*, p. 501.

(t) *Rex v. Sexton*, 1 Burn. Just. Doyl. & Wms. 1086, *ante*, p. . The proper course is to take the examination in the first person, *e. g.* 'I did so and so,' &c.

(u) Where a written examination previous to committal purported to have been taken upon oath, it was held that in fact it was not so taken, *ante*, p. 473.

magistrate and the prisoner.

ought to be read over to him, and likewise tendered to him for his signature. And by the late statute (*v*) the magistrate is expressly required to subscribe it. The signature, however, of the prisoner is not required by the statute, but he is to be got to sign it if he will. (*w*)

(*c*) *Proof of Statements. Impeaching Same.*

Examinations how proved under the new statute.

By the 11 & 12 Vict. c. 42, s. 18, where a prisoner's examination is returned with the depositions, and is in the proper form, it is admissible without any proof of the prisoner's or magistrate's signature. (*x*) It is read by the officer of the court. (*y*)

When a party charged with an indictable offence before a magistrate is asked by the magistrate, pursuant to the statute 11 & 12 Vict. c. 42, s. 18, whether he wishes to say anything in answer to the charge, and is told by the magistrate that he is not obliged to say anything, unless he desires to do so, but that whatever he says will be taken down in writing, and may be given in evidence against him upon his trial, and the prisoner thereupon makes a statement which is taken down; and the deposition containing it is duly returned, and bears upon its face that such caution has been given, and purports to be signed by the magistrate, and there is no evidence that any threat or promise has been held out to induce a confession from the prisoner; the deposition may, without further proof, be read in evidence against him on his trial, although the magistrate did not comply with the directions in the first proviso to the above-mentioned section, and give the prisoner to understand before he made his statement that he had nothing to hope from any promise of favour, and nothing to fear from any threat which might have been held out, but that what he should then say might be given in evidence against him, notwithstanding such promise or threat. *Semble*—that the last proviso to the same section overrides the whole section, and renders admissible in evidence against a prisoner any statement made by him either before a magistrate or on any other occasion, which independently of the statute would by law be admissible as evidence against him. (*z*)

(*v*) 11 & 12 Vict. c. 42, s. 18, *ante*, p. 501.

(*w*) See the form in the schedule, *ante*, p. 501.

(*x*) *Ante*, p. 501. As to proving the examination before the above Act, see 2 Hale, P. C. 52, 284. *R. v. Richards*, 1 M. & Rob. 396. *R. v. Chappell*, 1 M. & Rob. 395. *Smith's case*, 2 Lew. 139. *R. v. Christance*, 1 Cox, C. C. 143. In the three latter cases the prisoner had put his mark to his examination. *R. v. Hope*, 1 M. & Rob. 396. 7 C. & P. 136. *R. v. Taylor*, 7 C. & P. 136 *n*. In the two latter cases there was an attesting witness who was called. *Hobson's case*, 1 Lew. 66. *Priestley's case*, 1 Lew. 74. *R. v. Foster*, 7 C. & P. 143. *R. v. Spencer*, 1 C. & P. 260. *R. v. Rees*, 7 C. & P. 568. *R. v.*

*Reading*, 7 C. & P. 649. *R. v. Hearn*, C. & M. 109.

(*y*) *R. v. Swatkins*, 4 C. & P. 548.

(*z*) *R. v. Sansome*, 19 L. J. M. C. 143, *et per* Lord Campbell, C. J. In this case it appears that the deposition had been signed by the prisoner as well as by the magistrate. It is, therefore, clearly admissible in evidence at common law, unless there is some provision in the statute to exclude it. It has been argued that the statute makes it a condition precedent to its admissibility that the magistrate should have informed the prisoner that he had nothing to hope from favour, or to fear from any threat that might have been held out. There was no evidence here that any promise or threat had been held out by way of inducement. We think, therefore, tha

After taking the examination of the witnesses on a charge of felony against the prisoner, the magistrate cautioned the prisoner in the language prescribed by sect. 18 of the statute 11 & 12 Vict. c. 42, but did not, as the proviso to that section requires, tell the prisoner that he had nothing to hope from any promise of favour, or to fear from any threat. The prisoner then made a statement, which was taken down, but was not signed by the prisoner or the magistrate. The prisoner, after a remand, being brought again before the magistrate, some questions were put to the witnesses by the prisoner's attorney, who then objected to the statement being treated as the prisoner's statement, as an addition had been made to the evidence; and the prisoner being then asked if he wished to make any statement declined to do so. Held, that the prisoner's statement was admissible in evidence against him at his trial. (*a*)

As by the statute the magistrate is expressly enjoined to put the examination into writing, it will be intended that he did as the law requires; and parol evidence of a prisoner's statement before him ought not to be received until it is clearly shown that in fact such a statement never was reduced into writing. (*b*) And in order to render parol evidence of a prisoner's statement admissible, it is not sufficient for a witness to state that he did not see anything taken down in writing, (*c*) or that no examination was taken in writing, (*d*)

Parol evidence of examination before magistrate, is admissible after clear proof that the examination was not taken in writing.

there was no necessity for shewing that there had been any caution to the prisoner in that respect; and we are of opinion that it never can be considered that the giving the second caution is a necessary condition precedent to the admissibility of the statement of the prisoner, when it has been read over to him in the manner prescribed by the former part of the section, and has been signed by him as this has been. The words of the first proviso seem merely directory on the magistrate. There is no clause in the statute excluding the confession if the magistrate omits the second caution, when the deposition has been signed by the prisoner, and is otherwise admissible at common law. This deposition follows the form given in the schedule, which, it may be observed, contains the first caution, but not the second. Whether the giving that first caution is a condition precedent to admissibility, it is not necessary now to decide. With regard to the general question as to the admissibility of examinations of prisoners under the Act, the court are of opinion that where there is no evidence of any threat or promise having been held out to induce a confession, the examination of a prisoner may be read in evidence on his trial without further proof, if the deposition has been returned, and appears to be signed by the magistrate, and shews upon its face that the first caution has been given. See *R. v. Sansome*, 3 C. & K. 332, 4 Cox, 203, 19 L. J. M. C. 143. See *R. v. Higson*, 2 C. & K. 169. *R. v. Kimber*, 3 Cox, C. C. 223. *R. v. Harris*, 4 Cox, C. C. 147. *R. v. Hunt*, 4 Cox, C. C. 149.

(*a*) *R. v. Bond*, 19 L. J. M. C. 138.

(*b*) *Jacobs' case*, 1 Leach, 309. *Fearshire's case*, *ibid.* 202. *Hinxman's case*, *ibid.* 310, note (*a*). *Fisher's case*, *ibid.* 311, note (*a*). *Rex v. Hollingshead*, 4 C. & P. 242. *Phillips v. Wimburn*, 4 C. & P. 273. *Reg. v. McGovern*, 5 Cox, C. C. 506. Where the law authorizes any person to make an inquiry of a judicial nature, and to register the proceedings, the written instrument so constructed is the only legitimate medium to prove the result, 3 Stark. Ev. 786. Hence parol evidence cannot be received of the statement of a prisoner taken under the statute, where the examination has been taken in writing.

(*c*) *Phillips v. Wimburn*, 4 C. & P. 273, Tindal, C. J.

(*d*) *Rex v. Isaac Packer*, Gloucester Spr. Ass. 1829, MSS. C. S. G. In this case the witness stated that no examination was taken in writing, and Parke, J., said, 'As all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was taken in writing, and unless you can clearly show that the magistrate's clerk did not do his duty, I will not receive the evidence.' So in *Rex v. Phillips*, Worcester Sum. Ass. 1831, MSS. C. S. G., where a witness stated that he believed that what the prisoner said before the magistrate was not taken down in writing, but he was not quite certain that that was so; Bosanquet, J., said that the justice's clerk ought to be called to show whether anything had been taken in writing, as it must be presumed that he had done his duty; and the clerk was accordingly

but the magistrate's clerk must be called to prove that he did not take down in writing what the prisoner said. (e) But if in fact the examination was not taken in writing, parol evidence may be given of the prisoner's declarations. Before the 11 & 12 Vict. c. 42, Hall and two others were tried for burglary. The evidence was clear against the two others; but, excepting one or two slight circumstances, certainly not sufficient of themselves to have put Hall on his defence; the only evidence against him was his examination before the magistrate, which was not taken in writing, either by the magistrate, or by any other person, but was proved by the *vivâ voce* testimony of two witnesses who were present, and which amounted to a full confession of his guilt. On a case reserved on the question whether this evidence of the confession was well received, all the judges, except Gould, J., were of opinion that the conviction was right. (f) So a written examination before a magistrate will not exclude evidence of a previous parol declaration, which has not been reduced into writing. (g)

Irregular examination may be used to refresh the memory.

If an examination before a justice of the peace be taken in writing, under such circumstances of irregularity as preclude the writing from being itself given in evidence, yet the examination may be proved, as at common law, by some one who was present and heard it, and if he were the person who wrote down the examination, he may refresh his memory with it. (h)

Impeaching statements returned by the magistrate.

It seems that the prisoner may impeach the statement returned by the magistrate, and show that it was so irregularly taken as not to be admissible. Before the Act the prisoner was always at liberty, either by cross-examination or otherwise, to show that his statement was not admissible; and although the present enactment says that the statement may be given in evidence unless it shall be proved that the justice did not sign it, yet it never can be held that this enactment was intended to prevent the prisoner from proving that the statement was induced by promises or threats, or improperly and untruly taken down. The utmost effect that can reasonably be given to the clause is that the statement, when produced, shall be in precisely the same position as if a witness had proved the handwriting of the justice to it.

The circumstance of some part of the prisoner's statement being omitted by the magistrate, would not, it seems, render the examination inadmissible if it had been read over to the prisoner, and he has assented to its correctness. (i)

called, and proved that nothing was taken in writing, and then parol evidence was received of what the prisoner said before the magistrate.

(e) It should seem on the same ground that, where there is no magistrate's clerk present, the magistrate should be called to prove that he did not take the examination in writing. See *Rex v. Harris*, R. & M. C. C. R. 338, *post*, 508, where this course was adopted. C. S. G.

(f) *Hall's case*, cited by Grose, J., in *Lambe's case*, 2 Leach, 559. *Rex v. Huet*, 2 Leach, 821. *Rex v. Shillecock* and *Barnes*, *State Trials*, 1382.

MSS. C. S. G.

(g) *Rex v. M'Carty*, 2 Stark. Ev. 38. See also *Rex v. Reason* and *Tranter*, 16 How. St. Tr. 35, by Eyre, J. R. v. Tarrant, 6 C. & P. 182.

(h) *Dewhurst's case*, 1 Lew. 47. *Hirst's case*, 1 Lew. 47. *Rex v. Reed*, M. & M. 403. *Layer's case*, 16 How. St. Tr. 215. *Lambe's case*, 2 Leach, 257. R. v. *Telicote*, 2 Stark. N. P. C. 483. *Foster's case*, 1 Lewin, 46. R. v. *Jones*, 7 C. & P. 239. *Thomas's case*, 2 Leach, 637. R. v. *Pressly*, 6 C. & P. 183.

(i) *Joy*, 93, citing *Milward v. Forbes*, 1 Esp. 170, where an examination of the

The prisoner is not to be precluded from showing, if he can, that omissions have been made to his prejudice ; for the examination has been used against him as an admission, and admissions must be taken as they were made, the whole together, not in pieces, nor with partial admissions. Even the prisoner's signature ought not to estop him from proving, if he can, such omissions ; if the truth is, that omissions were made to his prejudice, the fact should be proved, and the prejudice suffered no longer to exist. (*j*)

Parol evidence is admissible to add to the written examination of a prisoner's statements made by him while before a magistrate, and which are not contained in such examination. Upon an indictment against Butler, Harris, and Evans, for stealing a ewe, the property of Bennett, it appeared that Harris, Butler, and Evans were taken before a magistrate about stealing three sheep of Bennett, Pennell, and Price ; at the meeting Bennett, Pennell, and Price were all present. The magistrate identified the examinations, and said that was all that was taken down ; that was what each of the prisoners said ; it was all in his writing, he had no clerk ; the informations were taken as to the three sheep before Evans and Harris were examined ; he took down everything that they said that he heard. The papers produced contained everything as he believed that transpired before him, and he intended to take down all that was said to him, and he believed he did. The room was very full. The papers produced were the depositions of Pennell, Price, and Bennett, as to the stealing of their sheep respectively, and Butler's examination and confession as to each offence. The following were the examinations of Harris and Evans :—‘ J. Harris being called upon for his defence, voluntarily saith that he was concerned in stealing a sheep, the property of J. Pennell, but that J. Butler was the foreleader in the business.’ ‘ W. Evans voluntarily saith that he did not kill the sheep, but that he helped to carry it away.’ A witness stated that Mr. C., the magistrate, examined Harris and Evans, and he wrote ; that when Harris was asked about Bennett's sheep, Mr. C. was at the table with his paper and pen before him, but his hand was not going. What Harris said about Bennett's sheep was said to Mr. C. Mr. C. heard what Harris and also what Evans said about Bennett. He took down in writing what they said about Bennett's sheep ; (*k*) what they said they said to Mr. C. Harris said he was connected with the taking of Bennett's sheep. Harris said they took a neddy out of the road, and put the sheep upon him. Evans said he helped to take the sheep—Bennett's sheep ; this was addressed to Mr. C. Another witness said that he heard Harris say that he helped to take Bennett's sheep ; that he addressed Mr. C. ; that Harris said to Evans, ‘ Speak the truth, you

Parol evidence may be given to add to the written examination of a prisoner taken by a magistrate.

defendant before commissioners of bankrupt was admitted in evidence by Lord Ellenborough, C. J., although it was proved that the defendant had said more than was taken down, the commissioners having taken down only what they considered relevant, upon the ground that the party, having signed it after he heard it so stated from his own words, and

read over to him before he signed it, it must be taken to be a statement of facts admitted by him.

(*j*) 2 Phill. Ev. 85.

(*k*) Quære, whether this should not be ‘ Pennell's sheep ?’ My MSS. note has no such statement of this witness, and ‘ Bennett’ might easily be printed erroneously instead of ‘ Pennell.’ C. S. G.

may as well speak the truth as not;' that Evans then said he helped to do it; he helped to take Bennett's sheep: what Evans said was addressed to Mr. C. The evidence of these two witnesses was objected to, but received; and, upon a case reserved upon the questions whether, as Harris and Evans had made a confession as to Pennell's sheep, which had been taken down in writing by the magistrate, any confession as to Bennett's sheep could be supplied by parol evidence; and whether, as the magistrate had taken down in writing everything he heard, and he intended to take down all that was said to him, and he believed he did, parol evidence could be given of anything else that was addressed to the magistrate; the judges were unanimously of opinion that the evidence being precise and distinct was properly received. (*l*)

Where the examination of a prisoner refers to the deposition of a witness.

On the part of the prosecution, the examination of a defendant, taken before a magistrate, was put in, and in it the defendant stated that the deposition of a witness, which had been taken at the same time, and before the same magistrate, was correct. Patten-son, J., held that the deposition of the witness might be put in and read as a part of the defendant's statement, although the witness had been examined on the trial as a witness for the prosecution, and although possibly his deposition might have the effect of contradicting his evidence on the trial. (*m*) But unless the examination of a prisoner specifically refers to the deposition of a particular witness, putting in the examination of the prisoner on the part of the prosecution will not entitle the prisoner to have any of the depositions read, although they were all taken before the prisoner made his statement. (*n*)

The examination of a prisoner is that alone which is taken after all the witnesses have been examined. A voluntary statement at any other time is admissible, and may be proved by any one who heard it.

Section 18 of the 11 & 12 Vict. c. 42, is only intended to apply to the concluding examination of a prisoner before the committing magistrate after all the witnesses have been examined, and does not apply to a voluntary statement made by a prisoner in the course of the examination, and before the conclusion of the case for the prosecution. Such a statement is admissible, and it is immaterial whether it is made before, during, or after a remand. (*o*) Therefore where a policeman took a prisoner before a magistrate, and applied to have her remanded, and produced a cash-box and iron chisel, stating his belief that it was with that instrument that the prisoner had opened the box; upon which the prisoner spontaneously, and without any question having been put to her, said that she had not opened the box by means of the chisel, but by a hammer; and no examination was taken before that magistrate, who merely granted a remand; it was held that the statement of the prisoner was admissible against her, although she had not been cautioned before she made it, and might be proved by

(*l*) *Rex v. Harris*, R. & M. C. C. R. 338, Lord Lyndhurst, C. B., Bosanquet, J., Taunton, J., and Gurney, B., *absentibus*. *Rowland v. Ashby*, R. & M. N. P. C. 231. See Phillips, vol. 2, p. 83. *Venafra v. Johnson*, 1 M. & Rob. 316. *Jeans v. Wheadon*, 2 M. & Rob. 486. But see *R. v. Walter*, 7 C. & P. 267. *R. v. Morse*, 8 C. & P. 605. *R. v. Lewis*, 6 C. & P. 161.

(*m*) *Rex v. John*, 7 C. & P. 324. The report does not state at whose instance the deposition was put in.

(*n*) *Rex v. Pearson*, 7 C. & P. 671. Law, Recorder, after consulting Patten-son and Williams, Js.

(*o*) *Per Jervis, C. J., Reg. v. Stripp*, *infra*. *R. v. Bell*, 5 C. & P. 162. *Lambe's case*, 2 Leach, 552.

the policeman. (p) Such a statement may be proved by any one who heard it. (q)

Where one of two prisoners was committed before the other was apprehended, and the depositions against the one prisoner were read over before the magistrate to the other prisoner, and after they were read that prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoners before himself, and the statement to the witness was not contained in it; Parke, J., held that what the prisoner had said to the witness might be given in evidence. (r) So 'an incidental observation made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against him at the trial.' (s) So where a woman was before the magistrates on a charge of burglary, and in the course of the examination of a witness a glove was produced, which had been found on the man with part of the stolen property in it, on which the man said, 'She gave me the glove, but she knew nothing of the robbery:' the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statement in the depositions or examination of the prisoner, Erskine, J., held that what the man said might be proved by parol evidence. (t)

On the examination of a prisoner on a charge of murder, one of the witnesses stated that she had bought a pot of the prisoner, upon which one of the magistrates asked what sort of a pot it was, and the prisoner, although the question was not particularly addressed to him, made an answer. It was submitted that no evidence could be given of what passed before the magistrate except the depositions. Coleridge, J., 'What the magistrate himself said would not be taken down. That may certainly be asked.' It was then submitted that the statement made by the prisoner and signed by the magistrate must be put in before it could be asked what the prisoner said. Coleridge, J., 'There seems to be no necessity for putting in the written examination. It is not what the prisoner says when called upon for his defence that is asked, but an observation made in the course of the case, and as that would not be put down as part of his statement, I am clearly of opinion that it is receivable.' The clerk to the magistrate then proved that he took down the examination of the witnesses, and that he took down what the prisoners said when they were asked what they had to say for themselves, but that he did take down anything which either

Parol evidence of a prisoner's answer to a magistrate's question while the witnesses were being examined.

(p) *Reg. v. Stripp*, 25 L. J. M. C. 109. *Dears. C. C.* 648. *R. v. Watson*, 3 C. & K. 111. But see *Garrow, B.*, in *R. v. Fagg*, 4 C. & P. 566. *Reg. v. Wilkinson*, 8 C. & P. 662.

(q) *R. v. Watson*, 3 C. & K. 111. *R. v. Bell*, 5 C. & P. 162.

(r) *Rex v. Johnson and Spiers*, Gloucester Spr. Ass. 1829, MSS. C. S. G. This case was relied upon at the trial of

*Rex v. Harris*, *supra*, by the counsel for the Crown. MSS. C. S. G.

(s) *Rex v. Moore*, Matth. Dig. C. L. 157, Parke, B.

(t) *Reg. v. Hooper*, Gloucester Sum. Ass. 1842. The clerk to the magistrates could not remember the observation, and it was proved by two policemen. MSS. C. S. G.

of the prisoners said before the witnesses had been all examined. Coleridge, J., 'At the close of the evidence for the prosecution the prisoner is asked if he wishes to say anything, and if he does, it is taken down, and the evidence of that statement is the written examination; but if a prisoner says something while the witnesses are under examination that does not stand on the same ground, I shall receive the evidence.' (u)

Statements made by a prisoner while cross-examining a witness before the magistrates and reduced to writing as part of the depositions, must be proved by the depositions and not by the witness so cross-examined. (x)

A confession of one offence during an examination of a charge of another offence.

The prisoner was indicted for receiving goods knowing them to have been stolen. There was a second indictment against him for breaking into and stealing from a church. When examined before the magistrate on this second charge, he made a confession as to the first charge. This was taken down in the usual manner, read over to the prisoner, and signed by the magistrate; but the prisoner refused to sign it. It was objected that the 7 Geo. 4, c. 64, only made these confessions evidence, on the authority of the magistrate's signature, when the confession was made on an examination having reference to the charge in support of which the confession was sought to be given in evidence. Erle, J., held that it mattered not for what purpose the confession was made; if it were made before a magistrate, taken down in the regular manner, and received the magistrate's signature, it thereby became valid evidence against the prisoner upon the trial of any other charge than that upon the examination in reference to which such confession had been made. (y)

The prisoner's statement may be put in in reply to evidence given for him.

Where the prisoner calls witnesses whose evidence is inconsistent with his statement before the magistrate, the statement may be put in evidence in reply. On an indictment for robbery the prisoner's coat was proved to have been bloody, and a witness for the prisoner stated that on the day before the robbery he had observed that the prisoner's coat was bloody, and the prisoner gave an account of how it became so; and it was held that the prisoner's statement before the magistrate, in which he accounted for the blood on his coat in a different manner, was admissible in reply to the evidence given by the prisoner. (z)

The prisoner's statement is evidence against him, but not for him; and therefore it cannot be put in evidence on his behalf. (zz)

### SEC. III.

#### Depositions. (a)

Depositions before magistrates.

As examinations and depositions before magistrates originate from the same Acts of Parliament, and are in some respects guided

(u) *Rex v. Spilsbury*, 7 C. & P. 187. Two cases bearing the other way are reported, but they cannot be supported. See *Reg. v. Weller*, 2 C. & K. 223. *Reg. v. Carpenter*, 2 Cox, C. C. 228. (x) *R. v. Taylor*, 13 Cox, C. C. 77. (y) *Reg. v. Pomeroy*, 1 Cox, C. C. 231. The constable proved the facts in this

case.

(z) *Reg. v. White*, 2 Cox, C. C. 192. Pollock, C. B., after consulting Coleridge, J.

(zz) *Reg. v. Haines*, 1 F. & F. 86, Crowder, J.

(a) As to a prisoner being entitled to inspect depositions, see *ante*, p. 428.



by the same decisions, it may be proper to consider the latter immediately after the former.

- (a) Present enactments as to depositions upon which prisoner committed for trial, p. 511.
- (b) Deposition must be duly taken, p. 513.
- (c) Form of deposition—Signing same, p. 518.
- (d) Depositions admissible when witness so ill as not to be able to travel, p. 521.
- (e) Other cases in which depositions admissible, p. 523.
- (f) When depositions admissible on trial of a different offence, p. 526.
- (g) Proof of depositions on trial, p. 530.
- (h) Depositions before coroner, p. 533.
- (i) Where witness examined before trial, p. 534.
- (j) Offences committed abroad—Merchant Shipping Act, p. 536.

(a) *Present Enactments as to Depositions upon which Prisoner committed for Trial.*

By 11 & 12 Vict. c. 42, (b) sec. 17, 'in all cases where any person shall appear or be brought before any justice or justices of the peace charged with an indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended, with or without a warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (M.) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; (c) and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, (d) by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, (e) and if also

Examination  
of witnesses.

Justice to ad-  
minister oath  
or affirmation.

Depositions of  
persons who  
have died, or  
who are ab-  
sent, may, in

(b) By the 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, justices of the peace were enabled and directed to take the depositions of witnesses in cases of felony; by the 7 Geo. 4, c. 64, these statutes were repealed and re-enacted with an extension to misdemeanors, and we have seen that the 7 Geo. 4, c. 64, is repealed so far as relates to the taking of the examinations and informations against persons charged with felonies

and misdemeanors, by the 11 & 12 Vict. c. 42, s. 34. The 11 & 12 Vict. c. 42, s. 17, has extended the admissibility of depositions, taken before a justice, so as to include those taken on a charge of high treason.

(c) See *post*, p. 520.

(d) *Duke of Beaufort v. Crawshaw*, 35 L. J. C. P. 342; as to proof by affidavit, see *per Willes, J.* S. C.

(e) Formerly if there were a permanent

certain cases,  
be read in  
evidence.

it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, (f) it shall be lawful to read such deposition as evidence in such prosecution, (g) without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.' (h)

'(M.) *Depositions of Witnesses.*

'To Wit. } The Examination of C.D. of [Farmer] and  
              } E.F. of [Labourer], taken on [Oath] this  
                  Day of                   in the Year of our Lord  
                  at                         in the [County] aforesaid, before  
the undersigned, [One] of Her Majesty's Justices of  
the Peace for the said [County], in the Presence and  
Hearing of A.B., who is charged this Day before  
[me], for that he the said A.B. on                   at  
[&c., describing the Offence as in a Warrant of Com-  
mitment].

'THIS Deponent C.D. on his [Oath] saith as follows [&c., stating the Deposition of the Witness as nearly as possible in the words he uses. When his Deposition is complete let him sign it].

'And this Deponent E.F., upon his Oath, saith as follows [&c.]

'The above Depositions of C.D. and E.F. were taken and  
[sworn] before me at   on the Day and Year  
first above mentioned.   J.S.'

By sec. 28, 'the several forms in the schedule to this Act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law.' (i)

inability to attend, as if the witness were so ill that there was no probability that he would ever be able to attend, his deposition was admissible. *R. v. Edmunds*, 6 C. & P. 164. *Rex v. Hogg*, 6 C. & P. 176. *Reg. v. Wilshaw*, C. & M. 145, *Coltman, J.*

(f) Where a charge of wounding with intent to murder was made before a magistrate at Bow Street, but in consequence of the illness of a witness, the prisoner was taken to Twickenham, and the deposition of the witness taken in the presence of the prisoner by two county magistrates, and signed by them, and after a further investigation at Bow Street the prisoner was committed; it was held that the deposition was admissible; for the 11 & 12 Vict. c. 42, ss. 17, 18, does not confine the admissibility of a deposition to the case of a person examined before the magistrate before whom the charge was made, and who committed the prisoner. *Reg. v. De Vidil*, 9 Cox, C. C. 4. *Blackburn, J.*

(g) Where a witness is too ill to travel, his deposition may be read by the grand

jury upon proof that it was duly taken in the presence of the prisoner, who had an opportunity of cross-examining the witness, and that the witness is too ill at the time to attend. *Reg. v. Clements*, 2 Den. C. C. 251. *R. v. Wilson*, 12 Cox, C. C. 622. In this case evidence was given before the judge that the witness was too ill to attend to be examined, &c., and the judge directed the deposition to be sent in to the grand jury. See *R. v. Bullard*, 12 Cox, C. C. 353, where Byles, J., is reported to have said that the grand jury are not bound by any rules of evidence. See *R. v. Gerrans*, 13 Cox, C. C. 158.

(h) The Irish Act, 12 & 13 Vict. c. 69, s. 17, was exactly similar to this section excepting that it omitted the words 'or so ill as not to be able to travel.' The 12 & 13 Vict. c. 69, was repealed by the 14 & 15 Vict. c. 93; see sec. 14 of that Act, which is similar to the repealed clause, and omits the same words as it did.

(i) See sec. 20, *ante*, p. 501, as to the mode of returning the depositions.

By 30 & 31 Vict. c. 35, s. 3. And whereas complaint is frequently made by persons charged with indictable offences, upon their trial, that they are unable by reason of poverty to call witnesses on their behalf, and that injustice is thereby occasioned to them, and it is expedient to remove, as far as practicable, all just grounds for such complaint: 'Therefore, in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed within this realm or upon the high seas, or upon land beyond the sea, and whether such person appear voluntarily upon summons, or has been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person for trial or admit him to bail, shall immediately after obeying the directions of the 11 & 12 Vict. c. 42, s. 18 (*ante*) demand and require of the accused person whether he desires to call any witness; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing, and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions, and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case, or tending to prove the innocence of the accused person, shall be bound by recognizance to appear and give evidence at the said trial, and afterwards upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken.

Examination of witnesses on behalf of prisoner.

By s. 4, all the provisions of the said Act 11 & 12 Vict. c. 42, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognizance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read and shall have operation as part of this Act.

See 30 & 31 Vict. c. 35, ss. 6 & 7, noticed, *post*, p. 534, which give power to magistrates to examine witnesses dangerously ill.

Examining witnesses dangerously ill.

### (b) *Depositions must be duly taken.*

It is a general principle of evidence that, to render a deposition of any kind admissible against a party, it must appear to have been taken on oath in a judicial proceeding, and that the party should have had an opportunity to cross-examine the witness. (*k*)

Depositions must be duly taken.

(*k*) By Hullock, B., in *Attorney-General v. Smith*, 2 Stark. N. P. C. 211. *General v. Davison*, 1 McClell. & Y. 189. note (10). See Hullock's case, 1 Leach,

The 11 & 12 Vict. c. 42, s. 17, *ante*, p. 511, requires the oath to be administered to a witness '*before such witness is examined,*' and the statement of the witness to be taken in the presence of the accused, who shall be at liberty to put questions to any witness produced against him; and it cannot be doubted that the only regular course of proceeding is for the justice to swear the witness in the presence of the accused, and then to examine him in the presence of the accused, and then to permit the accused to put any questions he may think fit.

*Seemle*, that since the 11 & 12 Vict. c. 42, s. 17, a deposition is not admissible unless it be taken down from the statement of the witness in the presence of the prisoner and the magistrate.

Where mere minutes of what each witness said before the magistrate were taken down, and the minutes were afterwards written out in the shape of depositions by a clerk in the presence of the witnesses, but in the absence of the prisoners and magistrate, and afterwards read over in the presence of the prisoners and magistrate, it was objected that the depositions were not taken according to this section; and Wilde, C. J., observed, 'So that the prisoner had a right to compare the verbal statements made with the written statements produced, which he could not do unless all the written statements produced had been made verbally in his presence.' And Maule, J., said, 'That section makes the depositions receivable in evidence upon its being first proved that they were taken in the presence of the person accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness. Therefore you would say that such full opportunity did not exist in the present case. Suppose a question to be put to the witness in the absence of the prisoner, which question involved two alternatives, and the answer to be "Yes," the magistrate's clerk might think the answer applied to a different alternative from that to which the prisoner would have applied it, had he been present, and had an opportunity of fixing it to such alternative by cross-examination; and the magistrate's clerk might have taken down the answer in such a form as to make it seem applicable to the wrong alternative. You contend that what they call minutes would have been the depositions had they been signed, and that the minutes not being signed, there are no depositions at all.' It, however, was unnecessary to decide the point, as the case was determined in favour of the prisoners on another ground. (*l*)

500. Dingler's case, 2 Leach, 561. Rex v. Paine, 1 Salk. 281. S. C. 5 Mod. 163, cited by Lord Kenyon in Rex v. Eriswell, 3 T. R. 722. Errington's case, 2 Lew. 142, Patteson, J. Rex v. Radbourne, 1 Leach, 457.

(*l*) Reg. v. Christopher, 1 Den. C. C. 536, 2 C. & K. 994. H. T. 1850. Before the 11 & 12 Vict. c. 42, where the greater part of the deposition of the deceased, in a case of murder, had been reduced into writing in the absence of the prisoner, but the deceased was afterwards resworn in the prisoner's presence, and the deposition read over and stated by the deceased to be correct, and the rest of the deposition taken in the ordinary way, in the presence of the prisoner, who was asked whether he chose to put any questions; it is held by Richters

C. B., that the deposition was admissible and a great majority of the judges, upon a case reserved, were of opinion that the evidence had been properly received. Rex v. Smith, R. & R. 339. S. C. 2 Stark. N. P. C. 208. Holt, N. P. C. 614. R. v. Hake, 1 Cox, C. C. 226. In a previous case, Rex v. Forbes, Holt, N. P. C. 599, where the constable stated, upon producing the deposition, that the prisoner was not present till a certain part of the deposition, distinguished by a cross, at which period he was introduced and heard the remaining part of the examination; and when it was concluded, the whole of the deposition was read over to the prisoner. Chambre, J., refused to admit that part of the deposition previous to the mark. In Reg. v. Beeston, Dears. C. C. 405, Alderson, B., said, in Rex v. Smith, 'I

On a trial for murder, Mr. Cooke, a magistrate, produced an information, and stated that he went to the house of the deceased, and found him on a pallet in a very weak state, and that the prisoner was brought to the house, where the deceased was; in consequence of the state in which the deceased was, he could say but very little at a time, and Mr. Cooke first took his information without the prisoner being present, and swore the deceased to it. Mr. Cooke then had the prisoner, who was handcuffed, brought in, and had the handcuffs taken off. Owing to the exhausted state of the deceased, the prisoner had to be brought close to the bed to hear what he said. Having then slowly read over the information to the deceased in the presence of the prisoner, and asked the deceased if it was true, and having been answered in the affirmative by him, Mr. Cooke then *reswore the deceased to his information* in the presence of the prisoner, and read over the information of the deceased to him, and while he was reading it the prisoner asked him to stop at some statement contained in it: but Mr. Cooke told him he had better read it over to the end, and that he would then read the information paragraph by paragraph distinctly to him, and that the prisoner could then put any question he wished to the deceased on each paragraph as read; that, having so read over the information, he read it over again paragraph by paragraph to the prisoner in the hearing of the deceased, and that part of it was read a third time to the prisoner; that the prisoner, having been previously duly cautioned by him, asked several questions with reference to the matters sworn in the information, and Mr. Cooke took down each question and answer as nearly as possible in the very words of the parties. The deposition was received in evidence; but, upon a case reserved, it was held that it ought not to have been received. (*m*)

A deposition rejected where it was taken originally in the absence of the prisoner, and afterwards the deponent was sworn, but not in a satisfactory manner, in the presence of the prisoner.

contended on the authority of *Rex v. Forbes* that the deposition was not admissible, as the prisoner had not a sufficient opportunity of cross-examination; that he had no opportunity of hearing the witness give his answers, and seeing his manner of answering; and that so much of the evidence as had been taken in the prisoner's absence was inadmissible; and I still think I was right in that objection.' See *R. v. Calvert*, 2 Cox, C. C. 491. In a case before the above act, on an indictment for robbery, it appeared that the depositions were not written either in the presence of the magistrate or of the prisoner, but the clerk to the magistrate examined all the witnesses, and took down what they said, neither the magistrate nor the prisoner being present; but that when the magistrate and the prisoner arrived, the depositions were read over to the witnesses in the presence of the magistrate and the prisoner, and the prisoner was then asked if he had any question to put to any of the witnesses; Platt, B., said, 'This is a very irregular and improper mode of taking depositions, and very unfair to the party accused. The prisoner ought to hear all the questions put and answered, for then he may

very possibly explain the circumstances; but it is monstrous that he should have a long bead roll of statements read over to him, and then be asked on the sudden if he has any question to put, and then probably, unable on the instant to extract from his accuser or the witnesses an explanation of every apparently criminating circumstance, be told that he is committed. Such a mode of proceeding does not afford to the party accused that fair play which the due administration of the law requires.' Reg. v. Johnson, 2 C. & K. 394, Sum. Ass. 1846. It does not appear whether any deposition was tendered in evidence.

(*m*) Reg. v. Walsh, 5 Cox, C. C. 115, M. T. 1850. There was considerable difference of opinion among the judges in this case. Monahan, C. J., was of opinion that 'what the Act of Parliament requires is, not that a witness shall depose to a written statement, but shall, in the presence of the accused, give a statement on oath, which the magistrate shall afterwards reduce into writing, and that the accused shall have an opportunity of cross-examining him, under the sanction of the same oath, whereby he swears to the information,' that the present case

The deposition ought to be taken in the presence of the prisoner, who ought to be asked with reference to the particular witness whether he has any question to ask.

Where it appeared that a witness had been examined before a magistrate, who had asked the prisoner whether she had any questions to put, but it seemed uncertain whether she was so asked with reference to the particular examination of the witness, or after all the depositions had been read over; and it also appeared that the examinations of the witnesses had been taken in writing before the arrival of the magistrate; and that they were then read over in the presence of the prisoner, when the prisoner was asked if she had any questions to put. It was held that the deposition was not admissible; 1st, because it was the duty of the magistrate to ask the prisoner whether she would put any questions with reference to the particular witness. 2ndly, the examination of the witness having been put in writing before the arrival of the magistrate, the reading it over in her presence did not give the prisoner a proper opportunity of cross-examination; she had a right to hear the evidence given step by step, and so to have time to consider what questions to put. (*n*)

Deposition written in the absence of the prisoner, afterwards read in his presence, and cross-examination by his attorney and notes of it written out at length.

Where the prisoner and prosecutor were present before the magistrate, and the prosecutor made a statement to the magistrate, which was not taken down in writing, and the prisoner's attorney asked the prosecutor a few questions in cross-examination, and these were not taken down in writing. The case was then adjourned to the next day, when the prisoner was brought up before the same magistrate; the prosecutor was again sworn, and the magistrate's clerk read over to him a written deposition which had been taken previously to the second hearing. The prisoner's attorney cross-examined the prosecutor, and that cross-examination, or some part of it, was taken down by the clerk, and from his notes afterwards a fair copy of the cross-examination was taken down on the copy which had been previously read. Hill, J., held the deposition admissible. (*o*)

and *Rex v. Smith* agreed in this point, that in both the witness was originally sworn in the absence of the accused; but the place where the present case failed was that, when the prisoner was brought in, the information was not taken on oath in his presence. Secondly, on the evidence of Mr. Cooke, the inference plainly arose that the oath was merely an oath to the truth of the information which had been sworn, and therefore did not extend to the answers given on cross-examination. Perrin, J., agreed with Monahan, C. J. on the first point; but added, 'The prisoner was kept handcuffed in another place, and here, deliberately and designedly, the magistrate proceeded, contrary to the fair import of the statute, to take the deposition of a party not on his oath, in the absence of the prisoner, who was within call, and who was designedly kept back and not called.' Ball, J., gave no opinion on the first point, but agreed with Monahan, C. J., on the second. If the magistrate had been silent as to the form of the oath which he administered, it would have been assumed that the oath was in the usual form; but here the

magistrate stated that he reswore the deceased to the truth of his information; thus confining the oath to the truth of the information; and, if this were so, the subsequent questions and answers were not under oath. Torrens, J., was of opinion that *Rex v. Smith*, R. & R. 339, governed the first point, and that the oath extended to the whole, and therefore the deposition was rightly admitted. Pennefather, B., agreed with Torrens, J., on the first point, but entertained very serious doubts upon the second point. This case was tried in 1850, after the 12 & 13 Vict. c. 69, had come into operation, though Perrin, J., states that the 9 Geo. 4, c. 54, was then in operation. C. S. G.

(*n*) Reg. v. Day, 6 Cox, C. C. 55. Platt, B. March 1852.

(*o*) Reg. v. Bates, 2 F. & F. 317. Wint. Ass. 1860. Hill, J., said, 'In the London Police Offices, where a great number of charges were daily heard, it was the constant practice to have the abbreviated notes taken during the examination of a witness by the magistrate's clerk, fair copied in full in an adjoining room, and that copy after-

Where it was proved that the deposition was taken in accordance with the invariable and long-established practice of the magistrate's court at Liverpool, and when the prisoner was before the magistrate, he was defended by an attorney, who had a full opportunity of cross-examining, and did cross-examine, the witnesses; a note of the evidence given before the magistrates, consisting of the names of the witnesses, and the heads of what each could prove, was taken by the magistrate's clerk; afterwards the prisoner and the witnesses were taken into a room, and there another clerk, who had not been present at the examination before the magistrate, examined the witnesses from the aforesaid note, and there wrote down the answers, and the witnesses then signed the papers so written by the last-mentioned clerk; the prisoner's attorney was not there, though he might have been if he liked; and the prisoner was not asked if he would then cross-examine the witnesses, and did not cross-examine them; afterwards the prisoner and the witnesses were again taken before the magistrate, and the evidence so taken down by the clerk in the room in the absence of the magistrate was read over to them; the prisoner was not then asked if he would cross-examine the witnesses, and his attorney was not then there, though he might have been if he had liked; the magistrate then cautioned the prisoner, who then signed his own statement, and the magistrate then signed the papers so written as last aforesaid. It was objected that the deposition was not taken in accordance with the 11 & 12 Vict. c. 42, s. 17, but the deposition was admitted; but, upon a case reserved, it was held that the depositions in this case were bad. The statute requires that they should be taken in the presence of the magistrate, and in the presence of the prisoner, and that the prisoner should have an opportunity of cross-examining the witnesses in the presence of the magistrate. In this case these provisions had not been complied with, and these depositions were taken improperly. (*p*)

Where a magistrate's clerk proved that he had taken down the examination of a witness before the magistrate, and he had no doubt that the attorney, who attended before the magistrate on behalf of the prisoner, had cross-examined the witness, but he had not taken down anything as cross-examination; he had, however, taken down everything the magistrate considered material. Erle, J., held that the deposition was admissible; all the requisites of the statute had been complied with. He did not think it the duty of the magistrate to take down every word; for then it would be necessary to conduct the examination by question and answer. (*q*)

Where it is proved that the prisoner was present when the depositions of the deceased were taken, although the law will presume that, as he was present, he had a 'full opportunity' of cross-examining the witness within 11 & 12 Vict. c. 42, s. 17, evidence

Where notes of the evidence were taken before the magistrate, from which the witnesses were re-examined by a clerk in the absence of the magistrate, and the examinations written out in full, and afterwards signed by the magistrate, the examinations were held to be improperly taken.

Where every word not taken down.

Full opportunity of cross-examination.

wards read over in the presence of the prisoner and signed by the witness. He thought such a practice not only convenient, but within the spirit and intention of the Act, as the prisoner had full opportunity as well as the witness of ob-

jecting if the evidence were put down incorrectly.' See *ante*, p. 514.

(*p*) Reg. v. Watts, L. & C. 339, Nov. 1863.

(*q*) Reg. v. Hendy, 4 Cox, C. C. 243. Spr. Ass. 1850.

may nevertheless be offered to prove that he had not such full opportunity within sec. 17, so as to render the depositions inadmissible. (r)

Where, before the above Act, at the time when the deceased was examined before the magistrate she was in a rapid decline, and she stated the facts of the assault upon her by the prisoner very concisely. On a question being put to her by the clerk, she said, 'I can't answer,' and was evidently in a sinking state. Down to this period she had answered the questions satisfactorily. The clerk then said he should not put any further questions; and it being stated that the prisoner's attorney, who was present, must have an opportunity of cross-examining the witness, he said, 'I shall decline putting any question; the child is evidently not in a fit state to answer.' The deposition was then signed by the witness with her mark. There was no subsequent examination, and the child died soon afterwards. Platt, B., inclined to think the deposition ought not to be received. (s)

(c) *Form of Deposition.—Signing same.*

Several depositions may have only one caption.

Where upon an indictment for murder the deposition of a witness, examined before the committing magistrate, and since dead, was tendered in evidence; there was a caption or heading at the commencement of the body of the depositions, but there was no caption at the head of this particular deposition; and it was objected that the deposition was, on this account, inadmissible. Alderson, B., 'All that is necessary in this case is to show that the deposition in question was regularly taken under the statute; the heading applies to all the depositions.' And the deposition was admitted. (t)

A deposition of a witness who is too ill to travel is admissible, if it refer distinctly to the charge on which the prisoner is being examined, and the prisoner was present when it was taken, had an opportunity of cross-examining,

The prisoner was indicted for obtaining by false pretences a promissory note for 50*l*. Upon the trial the deposition of Mary Rowe was put in, after proof that it was taken by the committing justice in the presence of the prisoner, and that she had a full opportunity of cross-examining M. Rowe; that it was signed by the said justice, and that M. Rowe was, at the time of the trial, so ill as not to be able to travel. The charge preferred before the said justice was that the prisoner had obtained the promissory note and other valuable securities by means of false pretences, and of this charge the prisoner was informed by the said justice. The caption of the deposition of M. Rowe was 'Devon, to wit. The examination of M. Rowe, wife of W. S. Rowe, of, &c., taken on oath this 14th day of February, A.D. 1849, at, &c., before the undersigned, one of her Majesty's justices of the peace for the said county, in

(r) *R. v. Peacock*, 12 Cox, C. C. 21. The prisoner's counsel gave evidence to show that at the time the deposition was taken the prisoner was insane.

(s) *Reg. v. Hyde*, 3 Cox, C. C. 90. Aug. 4, Sum. Ass. 1848, Platt, B., however, did receive the deposition, and would have reserved the point; but the prisoner was acquitted. There seems no reason to doubt that

able obstacle the prisoner is prevented from having a full cross-examination, the deposition is inadmissible, and the only question in such a case seems to be whether or not in fact the prisoner was prevented from having such full cross-examination.

(t) *Reg. v. Johnson*, 2 C. & K. 354. A.D. 1847.



the presence and hearing of H. L. (the prisoner), who is now charged before me this day for obtaining money and other valuable security for money from the said M. Rowe,' &c. It was objected that the charge set forth in the caption is obtaining money and valuable securities, but whether legally or illegally is not stated; and no offence was therefore shown, and the said deposition consequently was not receivable in evidence. The objection was overruled; and, upon a case reserved, Wilde, C. J., delivered judgment as follows: 'The judges are unanimously of opinion that the objection is not valid, and that the deposition was properly received in evidence. The objection is not that the evidence as set forth in the examination did not sufficiently appear to relate to the charge, upon which the prisoner was being tried, so as to warn and apprise her of the matter to which her cross-examination should be directed, but only that the title of the examination did not with sufficient distinctness state the charge against her. The title of the deposition states the occasion of its being taken, and the matter to which it refers, and *there is no authority requiring any title, or as it is called caption, to the examination*; and it is sufficient if it be described as the examination of the witness, and the evidence refers to the charge upon which the prisoner may be upon his trial; and as no objection was raised that the deposition was defective in that respect, we think the deposition was properly received in evidence. It may, however, not be improper to observe that the case states that the charge preferred against the prisoner was that of obtaining the promissory note and securities by means of false pretences, and that the prisoner was informed of that charge by the committing justice, and that she had a full opportunity of cross-examining the witness.' (u)

and the same charge was made against him before the justice, although the caption does not charge an offence. *Sensible that no caption is necessary.*

Where a woman, having been violated, cut her throat, and a magistrate was sent for, and in the presence of the prisoners, who were brought into her room, she made a statement on oath, which was taken down, read over, and signed by her. The prisoners did not in fact cross-examine her. The depositions of the other witnesses were taken before another magistrate on a charge of rape on the deceased a few days afterwards. There was no caption to the deposition of the deceased; but it was found attached to the depositions of the other witnesses, and there was a caption to these depositions, stating them to have been taken before the other magistrate. It was urged that the want of a proper caption could be supplied by parol evidence; but it was held that the 11 & 12 Vict. c. 42, s. 17, authorized taking depositions in a particular way; and unless it appeared upon the caption that the prisoners were charged with an indictable offence, the document was inadmissible (v)

A deposition without any caption.

(u) Reg. v. Langbridge, 1 Den. C. C. 448. 2 C. & K. 975. A.D. 1849.

(v) Reg. v. Newton, 1 F. & F. 641. Sum. Ass. 1859. Hill, J., after consulting Watson, B. If a document be inadmissible under the statute as a deposition, it might be used to refresh the memory of a person who wrote it upon hearing the evidence given, and he might prove what the deceased stated. Even if there were no writing at all, the evidence given

by the witness in the presence of the prisoners might be proved; for the general rule is, that 'where a witness already examined in a judicial proceeding between the same parties is since dead, his former examination is admissible as secondary evidence;' 1 Stark. Evid. 61; and although the new statute clearly makes a deposition taken in pursuance of it the best evidence of what the witness stated, yet, if through the neglect of the justice

The statement is to be in the words of the witness since the 11 & 12 Vict. c. 42.

By the 11 & 12 Vict. c. 42, s. 17, the magistrate is to take 'the statement' of the witness in writing, and the form in the schedule directs the deposition to be taken as nearly as possible in the words the witness uses. It cannot be necessary to take down immaterial and wholly irrelevant statements. (*w*)

If the prisoner or his counsel cross-examine the witnesses when before the magistrate, the answers of the witnesses to the cross-examination ought to be taken down by the magistrate, and returned to the judge. (*x*)

Deposition must be signed by deponent.

The new statute requires the deposition to be signed by the person making it; such signature was not necessary formerly for its admissibility. (*y*)

A prisoner's name affixed to the mark of a witness by mistake.

On a trial for manslaughter, the deposition of the deceased purported to have been made in the presence of the prisoner, and was signed by the deceased with a cross, he being a marksman. By mistake the clerk wrote the prisoner's name to the mark, so that it *prima facie* appeared to be the deposition of the prisoner. On a case reserved it was contended that this was a patent ambiguity, which could not be explained by oral testimony. It was answered that the document was complete when the deceased put his mark to it, and that signature could not be vitiated by what another person wrote: and it was held that the deposition was properly received in evidence. (*z*)

Must be by magistrate.

The magistrate himself, however, by the 11 & 12 Vict. c. 42, s. 17, is required to subscribe the examinations and informations taken by him: and this he ought to do at each examination, and not to defer it till he determines on committing. (*a*)

A deposition is bad which does not state that the person signing it is a magistrate.

Where a deposition had 'Kent to wit' in the margin, and purported to be 'taken on oath before us \_\_\_\_\_ of Her Majesty's justices of the peace for the said county,' and concluded, 'This examination was taken before us in the presence of (the prisoner) at Dartford, on the day and year first above mentioned—HUGH JOHNSON;' Maule, J., was of opinion that this document was inadmissible under the 11 & 12 Vict. c. 42, s. 17, as it did not purport to be signed by, or to have been taken before, any justice of the peace for the county in which the prisoner was examined, although it was offered to be proved that Hugh Johnson was a magistrate, and acting as such when the examination was taken; for such proof would not make the deposition purport to be signed otherwise than it did purport. (*b*)

or his clerk no deposition, or an irregular deposition, be taken, there is nothing in that statute to exclude the proof of the statement of the witness by other means. See *R. v. Galvin*, 10 Cox, C. C. 198. Reg. v. Clarke, 2 F. & F. 2.

(*w*) See per Erle, C. J. Reg. v. Hendy, 4 Cox, C. C. 248, *ante*, p. 517. The repealed enactment 7 Geo. 4, c. 64, s. 2, provided that magistrates shall take 'the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing.' Per Alderson B., *Rex v. Covey*, 7 C. & P. 667. *Rex v. Thomas*, 7 C. & P. 817. *Rex v. Gray*, 7 C. & P.

650. Reg. v. Weller, 2 C. & K. 223. Platt, B.

(*z*) Reg. v. Potter, 7 C. & P. 650, note. Gaselee, J., and Vaughan, B.

(*y*) See *Rex v. Fleming*, 2 Leach, 854, and see *Rex v. Russell*, R. & M. C. C. R. 356.

(*z*) Reg. v. Mullen, 9 Cox, C. C. 339. The deposition was headed, 'Deposition of James Brennan,' and began, 'Taken in the presence and hearing of Peter Mullen.'

(*a*) Reg. v. Mayor of London, 5 Q. B. 555, 1 Sess. Cas. 40.

(*b*) Reg. v. Miller, 4 Cox, C. C. 166. March 1850. This decision may be right if it be confined to deciding that

It is not necessary that the separate deposition of each witness should be signed by the justices, but it is sufficient if the depositions are signed as a body by the justices, according to the conclusion of schedule M. to the act. (c)

*(d) Deposition admissible when witness so ill as not to be able to travel.*

Where on a trial for larceny a surgeon proved that a witness was suffering from bronchitis, and that her life would be endangered if she were brought into court: it was objected that she was not proved to be so ill as not to be able to travel; but it was held that, as it was sworn that her attendance would endanger her life, the deposition was admissible. (d)

Where life would be endangered.

Where a witness had come to the assize town in order to attend a trial, and about half an hour before it came on was in the building where the court sat, when a medical man advised him to return home, and swore that his remaining to give evidence would, in his opinion as a medical man, have been highly dangerous, and the witness was on his way home while the trial was going on; it was held that his deposition was admissible; for the witness was not able to travel to the place at and in which he was to give evidence. The journey was not over until he arrived at the court, and as in the opinion of the medical man he could not without danger come to this court, he was not able to travel to the place where his evidence must be given. (e)

Where a witness came to the building where the court sat, but was sent away by a medical man, as his remaining would be highly dangerous.

So where upon an indictment for stealing, a physician proved that he had seen the prosecutor on the morning of the trial, and that he was not able to attend in consequence of a second attack of paralysis; he could not speak, and could not be made to hear, and if brought he would not be able to give evidence; but he might be brought without danger of his life, though he ought not to be permitted to roam abroad. He had been seen in the street the day before near his shop-door. It was objected that the prosecutor was not so ill as not to be able to travel according to the words of the statute, and that an application ought to have been made to postpone the trial; but the sessions held that, as he was disabled from giving evidence at the trial by an attack of illness, not plainly appearing to be temporary, his deposition was

Where a witness is too ill to give evidence, though he might attend without danger to his life, his deposition is admissible.

such an informal document is inadmissible under the statute as a regular deposition; but the deposition might have been used to refresh the memory of the justice's clerk who took down the evidence, and he might have proved what the witness deposed to before the justices.

(c) *R. v. Parker*, 39 L. J. M. C. 61. L. R. 1 C. C. R. 225. *R. v. Carrol*, 11 Cox, C. C. 322. *R. v. Young*, 3 C. & K. 106. *R. v. Lee*, 4 F. & F. 63. *R. v. Osborn*, 8 C. & P. 113. Where the depositions were on separate sheets, and were signed only at the end by the magistrate, the deposition of one of the witnesses who was dead, was admitted in evidence, although the sheets were not

fastened together at the time of the signature by the magistrate, but had been afterwards attached together by the magistrate's clerk. *R. v. Lee*, 4 F. & F. 63, per Pollock, C. B.; where the cross-examination was at a subsequent time to the examination in chief, and the whole deposition was held to be irregular, as the cross-examination was not signed by the magistrate. *R. v. France*, 2 M. & Rob. 207.

(d) *Reg. v. Day*, 6 Cox, C. C. 55, March, 1852. *Platt*, B.

(e) *Reg. v. Wicker*, 18 Jurist, 252. *Channell*, Serjt., after consulting Parke,

*Ex p. March*, 1854.

admissible ; and, upon a case reserved, it was held that this ruling was right. (*f*) So where a witness was suffering from a tendency to softening of the brain, and the surgeon proved that he was not in a condition to give evidence, as the effect of giving evidence would be dangerous to his life ; but he could go to the train in a cab and by the train ; he was so ill and nervous, however, that if vigorously cross-examined he would soon get confused and could not be depended upon ; and, though he could travel without material injury to his health, he could not complete the object of his journey ; the deposition was admitted. (*g*)

Cases where the proof has been insufficient to satisfy the court that the witness was too ill to attend.

A material witness had gone before the grand jury on the first day of the session, and had gone home at night and returned in the morning for two days ; but on the morning of the trial she had been seized with a bowel complaint, and when the policeman left Hounslow she was unable to travel ; it was held that the deposition was not admissible, as it was not satisfactorily proved that the witness was so ill as to be unable to travel. (*h*) So where a constable proved that he saw a witness in bed at nine o'clock the evening before, and he had a cold and inflammation, and was attended by a medical man, and on enquiry that morning he heard the witness was very bad ; it was held that the deposition was not admissible. (*i*)

Generally a surgeon should be called to prove the illness of the witness.

So where a witness had seen another witness, whose deposition was proposed to be given in evidence, in bed and apparently ill on the 18th of March, and she was then attended by a surgeon, and the trial was on the 23rd of March ; Patteson, J., said, 'I think that, in order to allow a deposition to be read in evidence under this enactment, the surgeon should be called, if there be one attending the witness. There, no doubt, may be cases where a person may be not in a state of health to be able to be present at a trial, and yet is attended by a surgeon, and in such cases other evidence may be sufficient, especially when the inability of the witness is of such a nature as to prevent even the possibility of his attendance as a witness ;' and rejected the deposition. (*j*) So where the attorney for the prosecution proved that he had seen a witness a few days before, and found him ill of fever ; Erle, J., refused to admit the deposition ; as the witness, not being a medical man, could not speak as to the nature of the disease. (*k*) So where a police constable proved that he saw King in bed on the morning of the trial. He had fever, and the divisional surgeon was attending him. Yesterday morning he was in bed, and is not able to get up yet. He had heard that King had been confined to his bed about a fortnight ; and he produced a certificate. Byles, J., refused to admit King's deposition, saying, 'I am of opinion that, to make this deposition admissible, there should be evidence of a medical man on oath, or other evidence upon oath, which the Court might think of equal value to sworn medical evidence. The

(*f*) Reg. v. Cockburn, D. & B. 203. H. T. 1857.

(*g*) Reg. v. Wilson, 8 Cox, C. C. 453, Jan. 7, 1861. The Recorder on the authority of Reg. v. Cockburn.

(*h*) Reg. v. Harris, 4 Cox, C. C. 440. Aug. 1850. The Common Serjeant.

is not stated who proved the illness.

(*i*) Reg. v. Ullmer, 4 Cox, C. C. 442. Oct. 1850. The Common Serjeant.

(*j*) Reg. v. Riley, 3 C. & K. 116. March 1851.

(*k*) Reg. v. Philips, 1 F. & F. 105. March 1858.

constable says he has been told King is suffering from fever; how can he know the illness is of such a nature as to render the witness "so ill as to be unable to travel?" A medical man is the proper witness of that fact.' (*l*)

Where a material witness for the prosecution had been delivered of a child a week before, and was unable to travel; it was contended that the prosecutor knew the state in which the witness was, and ought to have applied to postpone the trial; but it was held that the deposition was admissible, as every requisition of the statute had been complied with. (*m*)

Cases as to the pregnancy and delivery of women.

Where it was proved that a woman was daily expecting her confinement, and her brother stated that she was poorly otherwise, and that she was therefore too ill to travel from her residence to the place of trial, a distance of twenty-five miles; it was objected that the illness ought to have been proved by a medical man, and that the expectation of her confinement was not an illness within the 11 & 12 Vict. c. 42, s. 17; but the sessions admitted the deposition; and on a case reserved on the points raised on behalf of the prisoner, it was held that the deposition was properly admitted. The proposition that an approaching confinement was not such an illness as was contemplated by that section could not be sustained. There might be incidents attending an approaching parturition of such a nature as to bring it within the statute. The question whether the illness proved is or is not within the statute, is a question for the determination of the presiding judge, and if to his mind, exercising his discretion upon the facts proved, the evidence of illness is sufficient, the Court above ought not to interfere with his decision. (*n*)

Where a husband stated that his wife was pregnant and unable to attend; but he was unable to state how far advanced she was, and she was about the house attending to her household duties as usual, and had prepared breakfast for him that very morning as usual, and had not yet been confined to bed; but a fortnight before she had suffered somewhat in consequence of being driven to the assize town; Bramwell, B., permitted the deposition to be read. (*o*)

In one case (*p*) Lord Coleridge, in delivering the judgment of the Court of Criminal Appeal, said, 'We think that old age, and nervousness, and inability to stand a cross examination, is not a sufficient foundation for the reading of the deposition, and that it would raise a dangerous latitude in practice if we were to admit it upon such grounds.'

Old age and nervousness.

#### (e) Other cases in which depositions admissible.

A deposition of a witness, who has been kept away by the procurement of the prisoner, is admissible. Scaife, Smith, and Rooke

A deposition is not admissible merely

(*l*) Reg. v. Welton, 9 Cox, C. C. 296. Nov. 1862.

(*m*) Reg. v. Harney, 4 Cox, C. C. 441. Aug. 1850. Gurney, Commr. See R. v. Wilton, 1 F. & F. 309. R. v. Walker, 1 F. & F. 534.

(*n*) Reg. v. Stephenson, L. & C. 165, E. T. 1862. Erle, C. J., thought that the sessions acted rightly in admitting the deposition. See Duke of Beaufort v.

Crawshay, 35 L. J. C. P. 342. Reg. v. Huddersfield, 7 E. & B. 794. Reg. v. Omant, 6 Cox, C. C. 466, July 1854.

(*o*) Reg. v. Croucher, 3 F. & F. 285. Sum. Ass. 1862. The prisoner was acquitted, or the point would have been reserved.

(*p*) R. v. Farrell, 12 Cox, C. C. 605. See R. v. Thompson, 13 Cox, C. C. 181.

on the ground that the witness cannot be found after diligent search; but it is, if the absence of the witness has been procured by the prisoner. A deposition is only admissible against the prisoner procuring such absence.

were tried for robbery, and the deposition of one Garnett, which had been regularly taken before a magistrate, in the presence of the prisoners, was tendered in evidence. Due search had been made for the witness on the part of the prosecution, but she could not be found, and did not appear on the trial, and there was evidence that she had been kept away by the procurement of Smith; but this evidence did not implicate the other prisoners. The reading of this deposition was objected to on the part of Smith; but the learned judge admitted it, being of opinion that the procurement by Smith was proved; and in summing up he left Garnett's statement, among the other evidence, to the jury, not telling them that the deposition could affect Smith only. Upon a motion for a new trial after a verdict of guilty against Scaife and Rooke, it was held that the deposition was rightly admitted in evidence against Smith; for if it be proved that a witness is kept away by the procurement of the prisoner, the deposition of that witness is admissible; but that the deposition was erroneously left to the jury against the other prisoners; for a deposition is not admissible on the ground that the prosecutor, after using every possible endeavour, cannot find the witness; and the deposition is only evidence against the prisoner who procured the absence of the witness.' (q)

Witness insane at the time of the trial.

Where a witness, who was examined before the magistrate, is insane at the time of the trial, he is considered as in the same state as if he were dead, and his deposition may be given in evidence. (r) But in such a case it should be shown that he was not insane at the time his deposition was taken. Where on an indictment for murder it was clearly proved that a witness, who had been examined before the coroner, was insane at the time of the trial, and had been so for some time previously, but there was no evidence as to the state of the mind of the witness at the time when he was examined before the coroner; and it was pro-

(q) *Reg. v. Scaife*, 17 Q. B. 238; 2 Den. C. C. 281. E. T. 1851. Although there was nothing in the former statutes providing that the depositions taken under them should in any case be evidence, yet it was considered, that if it were previously proved satisfactorily to the court that the witness was dead, or that he had been kept away by the practices of the prisoner, his deposition might be given in evidence on the trial of an indictment: provided the deposition were duly taken upon oath in the presence of the prisoner, when charged before a magistrate. 1 Hale, P. C. 305, 586. Bull. N. P. 242. See *R. v. Shippey*, 12 Cox, C. C. 161. *R. v. Smith*, 2 N. P. C. 211. *R. v. Ward*, 2 C. & K. 759. Harrison's case, 4 St. Tr. 492, 5th Res. in Lord Morley's case, Kelyng, 55. Fost. Disc. 337. Mr. Starkie in a very able note to the case of *Rex v. Smith*, 2 N. P. C. 211, observes that the two statutes of Ph. & M. seem to have been passed without any direct intention on the part of the legislature to use the examinations and depositions as evidence

upon the trials of felons. But the taking of them having been sanctioned by the legislature, they became, it seems, admissible in evidence upon the rules and principles of evidence already established; and the effect of the statutes in point of evidence seems to consist in removing an objection which would before have occasioned the rejection of such evidence, namely, that the proceeding was *extra-judicial*. 'The object of taking the depositions is that if any of the witnesses, whose evidence is given before the magistrates, should be unable to attend at the trial, or die, there should not by reason of this be a failure of justice.' Per Cresswell, J., *Reg. v. Ward*, 2 C. & K. 759.

(r) *Rex v. Eriswell*, 3 T. R. 707, per Lord Kenyon, C. J., Ashurst, J., and Grose, J., and there seems no reason to doubt that the deposition of a person who has become insane at the time of the trial would be admissible since the new statute, either on the same ground as *Reg. v. Scaife*, *supra*, or *Reg. v. Cockburn*, *ante*, p. 522, was decided.

posed to give his deposition in evidence, Park, J. A. J., said, 'There is one positive objection, that the witness might be insane when he was examined before the coroner;' and the deposition was rejected. (s) But where on an indictment for night poaching and assaulting W. Rickards it appeared that he was suffering from delirium and depression of spirits in consequence of a blow on the head, and his intellects were affected by the injury, but it was probable that he would recover: it was held that if he was actually insane at the time of the trial his deposition taken in the presence of the defendant was receivable in evidence, although the insanity might be temporary; but the medical witness, being unable to state that he was at the time of the trial in a state of insanity, the deposition was rejected. (t)

It has been said that the deposition of a witness beyond the sea was admissible, (u) but it was held before the new Act that the deposition of a witness, who had been examined before the magistrate, and who had since gone to sea, was inadmissible. (v) And since the new Act, where on a trial for larceny it was proposed to put in evidence the deposition of W. Doodt, which had been duly taken in the presence of the prisoner, who had the opportunity of cross-examination, and it was satisfactorily proved that W. Doodt was not absent with any intention of defeating justice, but, being a foreigner, serving on board a foreign vessel at the time the property was stolen, he had, since the committal of the prisoners, returned to his own country, and at the time of the trial was residing in a foreign kingdom. It was contended that, although the cause of absence was not within the 11 & 12 Vict. c. 42, s. 17, the deposition was receivable independently of that statute. But, on a case reserved, it was held that the deposition was inadmissible. Although it was quite possible that cases might occur in which depositions would be receivable in evidence under the old rule, and independently of the statute, yet if the admissibility of depositions was extended beyond the cases provided for by the statute, the rule ought to be carefully and rigidly limited. And in this case it was consistent with what appeared that the attendance of the witness might have been obtained, and it was not shown that anything was done by writing or otherwise to procure his attendance. (w)

One of the objects of passing these statutes was to enable the judge and jury before whom the prisoner is tried to see whether the evidence of the witnesses at the trial is consistent with the account given by them before the committing magistrate; (x) and therefore an information, when judicially and regularly taken, may be used on the part of the prisoner, when the informant gives his evidence at the trial, to contradict his testimony. Thus it was ad-

Witness at the  
time of trial  
at sea or  
abroad.

Deposition  
may be used  
to contradict  
witness by the  
prisoner;

(s) *Rex v. Charles Wall*, Worcester Sum. Ass. 1830. See this case more fully stated, *post*, p. 534. In *Rex v. Eriswell*, *supra*, the pauper, whose examination was in question, had become insane after the examination was taken.

(t) *Reg. v. Marshall*, C. & M. 147, Ludlow, Serjt., after consulting Coltman, J. It is not stated in the report when the blow on the head was inflicted.

(u) *Bull. N. P.* 242.

(v) *Reg. v. Hagan*, 8 C. & P. 167, Bolland, B., and Coltman, J. By consent of counsel for the Crown, it seems it might be read for the prisoner. S. C. See *R. v. Hunt*, 2 Cox, C. C. 261.

(w) *Reg. v. Austin*, Dears. C. C. 612, 7 Cox, C. C. 55. Jan. 1856.

(x) See the judgment delivered by Grose, J., in *Lambe's case*, 2 Leach, 558. 2 Phil. Ev. 76.

and by the  
Crown with  
the permission  
of the court,

mitted in *Lord Stafford's case*, (y) that the deposition of a witness, taken before a justice of the peace, might be read at the desire of the prisoner, in order to take off the credit of the witness, by showing a variance between the deposition and the evidence given in court *vivâ voce*. And not only on the part of the prisoner, but of the Crown, by the permission of the judge, depositions may be so used, even for the purpose of impeaching the credit of a witness called for the prosecution.

Thus where a witness for the prosecution, on being examined, gave a different account of the transaction from what he had deposed to before the committing magistrate, and the counsel for the prosecution proposed to contradict him by proving the deposition, which was objected to on the part of the prisoner; Bayley, J., after consulting Holroyd, J., admitted the proposed contradiction. (z) And see as to the present practice 28 & 29 Vict. c. 18, s. 3, noticed *post*, ch. 5, s. 2.

(f) *When Depositions admissible upon trial of a different offence.*

Depositions  
admissible  
upon trial of  
a different  
offence.

If the depositions were duly taken before the new statute, they were receivable in evidence, after the death of the deponent, not only upon the trial of the prisoner for the offence with which he was charged at the time they were taken, but upon an indictment for another offence. Thus a deposition was held admissible in a case of murder, although it was taken when the prisoner had been brought before two magistrates upon a charge of an assault upon the deceased, and also upon a charge of robbing a manufactory which the deceased had been employed to guard. (b)

Since the 11  
& 12 Vict.  
c. 42.

But the particular wording of the 11 & 12 Vict. c. 42, s. 17, has led to some doubt upon this subject. (c)

A deposition  
taken on a  
charge of as-  
sault held not  
admissible on  
an indictment  
for cutting  
with intent to

Upon an indictment for wounding T. Goode with intent to do him grievous bodily harm, it appeared that at the time of the trial T. Goode was too ill to attend, and that his deposition had been taken before the committing magistrate according to the 11 & 12 Vict. c. 42, s. 17, on a charge of assault against the prisoner, which was founded on the same identical evidence as was offered in support of the present indictment: and it was held that this deposi-

(y) 3 St. Tr. p. 131. 2 Phill. Ev. 76.

(z) *Rex v. Boyle*, cited in *Wright v. Beckett*, 1 M. & Rob. 422. *Oldroyd's case*, R. & R. 88. *Wright v. Beckett*, 1 M. & Rob. 414. *Reg. v. Hallett*, 9 C. & P. 748. *Reg. v. Williams*, 6 Cox, C. C. 343.

(b) *Rex v. Smith*, R. & R. C. C. R. 339. S. C. 2 Stark. N. P. C. 208. Eleven of the judges met. *Abbott, J.*, thought the evidence ought not to have been received. *Dallas, J.*, *Graham, B.*, *Richards, C. B.*, and *Lord Ellenborough* stated that they should have doubted the admissibility of the evidence but for the case of *Rex v. Radbourne*, 1 Leach, 457. *R. v. Shippey*, 12 Cox, C. C. 161.

(c) In *Candle v. Seymour*, 1 Q. B. 889, where a clerk went upstairs and took the

information of a girl as to an assault, on oath, whilst the magistrate remained in the kitchen, and it did not appear that he heard what the girl said, it was held that the information was illegally taken, as it was not taken in the presence of the magistrate. *Coleridge, J.*, said, 'It is far too common a practice for the clerk to examine the witness apart, and take down the answers, and then read them over in the magistrate's presence;' and again, 'A magistrate taking depositions has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given. If he does not, how is he in a condition, supposing the charge were felony, to decide whether or not bail shall be taken?'



tion was not admissible in evidence upon this indictment. Where a prisoner was taken before a magistrate on any charge, his attention would necessarily be directed to that particular charge, and his cross-examination would probably be directed to meet such charge alone; in addition to which, cases might well be supposed in which the justice might prevent the prisoner from cross-examining as to anything which did not appear to him relevant to the particular charge then pending before him. Upon these grounds it would be very unreasonable to permit a deposition taken on a charge for one offence to be admitted against a prisoner on a trial for a different offence. Then, if the words of the section itself were carefully examined, it was plain that they only authorized the giving in evidence of a deposition upon an indictment for the very same offence as was 'charged' before the justice. The section commences by directing the manner in which a deposition is to be taken against any person 'charged with any indictable offence,' and afterwards provides that 'if upon the trial of the person *so accused*' certain proof be given, such deposition may be read 'as evidence in *such* prosecution.' Now that must mean a prosecution for the very offence 'charged' before the justice. (d) Whether, therefore, the reason of the thing or the words of the section were considered, a deposition could only be admissible where the indictment was for the same identical offence as that 'charged' before the justice, and upon which such deposition was taken, and consequently this deposition must be rejected. (e)

do grievous  
bodily harm.

But where the prisoner was indicted for manslaughter, and the deposition of the deceased had been taken on a charge that the prisoner did feloniously stab, cut, and wound the deceased, of which stabbing, cutting, and wounding the deceased was likely to die, and the preceding case was cited; Wightman, J., received the deposition, saying, 'There is no decision precisely in point. The case cited differs in one respect from this. There the original charge was an assault; here there is something more.' (f)

Deposition on  
a charge of  
feloniously  
wounding ad-  
mitted on a  
trial for man-  
slaughter.

On a trial for murder it appeared that between the blow and the death the deposition of the deceased had been duly taken before a justice, in the presence of the prisoner, on the charge of wounding the deceased with intent to do some grievous bodily harm to him, and the admission of this deposition was objected to on the ground that the deposition was not taken on the same charge for which the prisoner was on his trial, and the two preceding cases were cited; but the deposition was received, and, on a case reserved on the question whether the deposition taken on the charge of maliciously wounding with intent, &c., was properly received in evidence, it was held that it was. Before the passing of the 11 & 12 Vict.

A deposition,  
on a charge  
of wounding  
with intent to  
do grievous  
bodily harm  
admissible on  
a trial for  
murder.

(d) Sec. 20 also shows that this is the meaning of this section, for, if a party be bound by recognizance to give evidence against a prisoner for one offence (an assault), he clearly would not forfeit his recognizance by failing to give evidence against such prisoner for another offence (feloniously wounding).

(e) Reg. v. Ledbetter, 3 C. & K. 108. Sum. Ass. 1850. Greaves, Q. C., after consulting Lord Campbell, C. J., and

Williams, J., and referring to Rex v. Smith, *supra*. Lord Campbell, C. J. thought that the authority of Rex v. Smith was very much impaired by the dissent of Lord Tenterden, and all agreed that that case was not binding under the 11 & 12 Vict. c. 42, s. 17.

(f) Reg. v. Dillmore, 6 Cox, C. C. 52, March 1852. The point would have been reserved, but the prisoner was acquitted.

c. 42, the deposition would have been admissible, (g) and there was nothing in the 11 & 12 Vict. c. 42, to render it inadmissible, or to restrict the rule, which had been established by practice since the statutes of Philip and Mary. The legislature has provided 'that the persons whose evidence is to be taken shall be "those who shall know the facts and circumstances of the case," not of the particular technical charge on which the prisoner is afterwards tried; and then it says that if the witness be dead the deposition may be admissible "on the trial of the person so accused," not on his trial for the particular offence with which he was charged before the magistrate; and though the charge at the trial be not identically the same as that made when the deposition was taken, no harm can result from holding it admissible; because it would always be matter for inquiry by the judge trying the case whether the prisoner had had a full opportunity for cross-examination; if the charge on which the deposition was taken was not identical with that stated in the indictment.' (h) 'The question is not whether the charge made on the inquiry before the magistrate was exactly the same as that made on the trial, but whether the inquiry was such as afforded to the party accused a full opportunity of cross-examination?' (i) 'In *Reg. v. Ledbetter* it might very well have been that a full opportunity of cross-examination was not afforded. On a charge for a common assault, the wounding subsequently charged in an indictment might not have been material; (j) but here the whole of the circumstances which came before the court at the trial were before the magistrate, with the single exception of the death of the deceased; and the prisoner's opportunity of cross-examining was so complete, that his counsel's ingenuity could not suggest a question on the one inquiry which would not have been so on the other.' (k) If this construction were not the true one, the deposition of a person, who afterwards died, could never be used on a trial for the murder or manslaughter of that person. (l)

But this case by no means decides that a deposition would be admissible if the charges on the two occasions were substantially different. (m)

Where on an indictment for murder by administering poison with intent to procure abortion, the deposition of the deceased had been taken on a charge against the prisoner of having administered, or caused to be taken, poison in order to procure abortion; Cockburn, C. J., admitted the deposition, being disposed to think that, the transaction being the same, the evidence was admissible, although, in consequence of the death of the woman having supervened, the charge had assumed a different shape and character. (n)

(g) *Rex v. Radbourne*, 1 Leach, 457.

*Rex v. Smith*, *ante*, p. 526.

(h) Per Jervis, C. J.

(i) Per Alderson, B.

(j) Alderson, B., added, 'I therefore do not say whether Mr. Greaves was or was not wrong in rejecting the deposition in that case.'

(k) Per Alderson, B.

(l) *Reg. v. Beeston*, Dears. C. C. 405, M. T. 1854.

(m) In *Reg. v. Beeston*, Jervis, C. J., said, 'I do not mean to say that a deposition would be admissible if the charges on the two occasions were substantially different.'

(n) *Reg. v. Fretwell*, L. & C. 161, E. T. 1862. The point was reserved together with another, which being decided in favour of the prisoner, this point was not noticed.

Where the charges are substantially different.

Deposition on a charge of administering poison with intent to procure abortion, admitted on a trial for murder.

Where on a trial for murder it appeared that the prisoners had been originally apprehended on a charge of robbing the deceased with violence, and the death was alleged to have been caused by that violence; Pollock, C. B., admitted the deposition of the deceased, which had been made, on the charge of robbery with violence, in the presence of both prisoners, with a full opportunity of cross-examination. (o)

Deposition on a charge of robbery with violence admitted on a trial for murder.

Where a prisoner is charged before a magistrate with obtaining money by false pretences, and afterwards indicted for uttering a forged promissory note, the charges arising out of one and the same transaction and being in fact identical, and the prisoner having had the opportunity of cross-examination before the magistrate: held, that the deposition of a witness taken at such hearing, and who was afterwards unfit to travel to give evidence, was admissible and might be read at the trial for uttering the forged promissory note. (p)

On a trial for murder it appeared that the deceased had sworn an information for rape against the prisoner in his presence, and had subscribed it with her mark, before a magistrate, and the prisoner had executed a recognizance, with sureties, to appear to the charge at the ensuing assizes; before which, however, he married the deceased, but they never lived together after the marriage; and statements of the prisoner were proved tending to show that he married her to prevent the prosecution, and he had said that he would give her a short life. Christian, J., received the information and recognizance; but he told the jury that they were not to regard them as evidence of anything, save simply of the facts that, before the parties married, such a charge had been made, and the prisoner placed under recognizances to stand his trial for it; that they had nothing whatever to do with the question whether the charge was true or false, but that the facts evinced by the mere existence of these documents might be taken into their consideration, along with the other circumstances, specially as bearing upon the question of the existence of a motive, which might have prompted the prisoner to the commission of the murder. And, on a case reserved, it was held that this evidence was properly admitted. It was not offered as evidence of an information taken under the statute, but was given in evidence as a charge found to be in writing, and which happened to be in writing, because the information was made upon a certain occasion. The recognizance of the prisoner was taken upon the same occasion as that on which the charge was made, and was also in writing, and was no more to be regarded than if the statute had never been made. If the charge rested on parol evidence, and the party by whom it had been made had used expressions equivalent to what appeared in the information, all that might have been given in evidence; but nothing of the sort could here be given in evidence, as all of it was in writing, and the only proper evidence of the writing was the documents containing the matters which had been so committed to writing. The documents were not given in evidence to substantiate the truth of the charge, but merely as to the fact that they had

An information for rape and recognizance of the accused to answer the charge admitted in order to prove a motive for the murder of the informant.

(o) Reg. v. Lee, 4 F. & F. 63. Spr. (p) R. v. Jenkin Williams, 12 Cox, Ass. 1864.

been made, and that the prisoner had entered into the recognizances. (g)

(g) *Proof of Depositions on Trial.*

Every deposition taken by a magistrate ought to be returned.

It is the duty of magistrates to return to the court at which the prisoner is to be tried, all depositions that have been taken at all the examinations that have taken place respecting the offence which is to be the subject of the trial. (r)

And it is equally the duty of the magistrate to return the depositions of witnesses who are not bound over. (s)

As to returning depositions taken on behalf of the prisoner. See 30 & 31 Vict. c. 35, s. 3, noticed *ante*, p. 513. (t)

Proof on trial.

By the 11 & 12 Vict. c. 42, s. 17, (u) after it has been proved that the witness is 'dead or so ill as not to be able to travel,' it must be proved, 1st, that 'the deposition was taken in the presence of the person so accused;' and 2ndly, 'that he or his counsel or attorney had a full opportunity of cross-examining the witness;' and then, 'if such deposition purport to be signed by the justice' or justices by or before whom the same purports to have been taken, the deposition may be read as evidence without further proof, unless it shall be proved that the deposition was not in fact signed by the justice purporting to sign the same.

Deposition before a coroner.

A deposition taken before a coroner may be proved by the coroner, or by any person who can prove the signature of the coroner, that the witness was sworn, that the deposition contains the evidence given by the witness, and that the prisoner was present and had an opportunity of cross-examining the witness. The deposition in this case need only contain so much of the evidence as is material. (v)

Proof of deposition in order to examine upon it.

Where, before the 11 & 12 Vict. c. 42, it was proposed to prove the deposition of a witness in order to cross-examine her upon it, and neither the magistrate nor his clerk were at the assizes, and the witness denied her mark to the deposition; but a constable, who was present before the magistrate when the witness was examined, proved the signature of the magistrate, but was not sure that he saw the witness make her mark to it, though he recollected seeing the pen in her hand, and heard her deposition read over to her, and believed the deposition to be the same that was read over to her, and his own deposition immediately followed it; Coleridge, J., held that the deposition might be read to the witness to examine her upon it. (w)

Deposition of a person of weak intellect.

Upon an indictment for ravishing Sarah Higgins, it appeared that she was a person of very weak intellect; but her deposition

(g) *R. v. Lydane*, 8 Cox, C. C. 38.

(r) *Rex v. Simons*, 6 C. & P. 540.

(s) *Rex v. Smith*, 2 C. & K. 207. Lord Denman, C. J.

(t) See 11 & 12 Vict. c. 42, s. 25; 7 C. & P. 270. 2 C. & K. 845. *R. v. Clark*, 5 Cox, C. C. 230. *Rex v. Fuller*, 7 C. & P. 269. Vaughan, J. See Reg. v. Arnold, 8 C. & P. 621.

(u) *Ante*, p. 511. Before this Act depositions might be proved by any one who was present when same were taken.

*R. v. Pikelsley*, 9 C. & P. 124. *R. v. Wilshaw*, C. & M. 145, but see 2 Hall, P. C. c. 38, p. 284.

(v) See the 7 Geo. 4, c. 64, s. 4, *ante*, p. 500, note (f). See England's case, 2 Leach, 770, as to proof of depositions before coroners.

(w) Reg. v. Hallett, 9 C. & P. 748. Coleridge, J., said, 'Suppose there was no mark at all, why should not a third person say that this was the paper that was read over to the witness?'

before the magistrate was in the usual form, and did not show anything as to any inquiry into the competency of the witness in point of intellect; and when she was called as a witness, she appeared not at all to understand the nature of an oath, and to have no idea of a future state; upon which Wilde, C. J., observed, 'It would be always desirable, where a person of weak intellect is examined before a magistrate in a case of felony, that the magistrate's clerk should take down in the depositions the questions put by the magistrate, and the answers given by the witness as to the witness's capacity to take an oath. (x)

And since, as in the case of examinations, it will be intended that the magistrate, according to his duty, took the deposition in writing, parol evidence of the information is inadmissible, till it is shown that it was not reduced to writing. (y) Thus where the plaintiff had been arrested on a charge of felony and taken before a magistrate, who discharged him, and there was no positive evidence whether the examinations of the witnesses had been taken in writing, and it was urged that, as no case had been made out against the plaintiff, it was to be presumed that no depositions had been taken in writing; Jervis, C. J., said, 'The statute positively requires every examination before justices to be taken down in writing. I know this is frequently neglected under the circumstances mentioned, but it is a practice quite illegal and highly improper. I cannot in any case presume that the law has been violated, and therefore without positive evidence that in this case the examinations have not been taken down, I cannot admit parol evidence.' (z)

Parol evidence of a deposition is not admissible unless it be clearly proved that it was not taken in writing.

Where on the trial of an action for a malicious prosecution it appeared that the defendant had made a charge against the plaintiff before a magistrate, the hearing of which was in the first instance adjourned, and on a subsequent occasion the case was heard, and the depositions were gone through, taken down, and the plaintiff committed for trial. A magistrate's clerk attended on the first occasion, and took down what the defendant said, but neither the defendant nor the magistrate signed it; it was objected that parol evidence of what the defendant said on the first occasion was inadmissible, and that the writing must be produced. Cresswell, J., 'I know from the depositions returned to me at the assizes, that in practice, when a case is adjourned, the depositions are not regularly reduced to writing under the statute; and I think that parol evidence is admissible here of what was said on the first occasion. If two persons are present on the examination of a witness, and one takes a note of what the witness says, and the other does not, the latter is as competent as the former to prove what he heard.' (a)

Where in an action for maliciously laying an information before

Evidence is admissible to

(x) Reg. v. Painter, 2 C. & K. 319. With all deference, such questions and answers are preliminary to the swearing of the witness, and cannot therefore form any part of the deposition. It might be well, however, to make a note of the questions and answers either on another paper, or separately from and so as to form no part of the deposition.

confession, such as Reg. v. Dingley, 1 C. & K. 637, of course anything the prisoner says may be inserted. C. S. G.

(y) Rex v. Fearshire, 1 Leach, 202.

(z) Parsons v. Brown, 3 C. & K. 295.

(a) Jeans v. Wheedon, 2 M. & Rob. 486. See the reporter's note there. See also Reg. v. Christopher, 1 Den. C. C.

explain or add  
to a deposition.

a magistrate, that he, the defendant, apprehended danger to his life or bodily harm from the plaintiff, the information of the defendant, taken in writing by the magistrate's clerk was put in, after being proved by the clerk, and after it was read the counsel for the defendant asked the clerk in cross-examination whether the defendant had not, in addition to what appeared in the information, stated that, on the occasion deposed to, the plaintiff had used a certain threat; and the question was objected to on the ground that it went to explain or add to the written information; Gaselee, J., as the point was a difficult one and of frequent occurrence, consulted the other judges of the Court of Common Pleas, and stated that they all were of opinion that evidence was admissible to prove anything the party had said as part of his information, beyond what was put in writing, either for the purpose of explanation or addition. (b) Upon an indictment for obtaining money by false pretences, a witness was examined for the prosecution, who had been examined before the magistrates, *on the application of the prisoner*, touching the present charge, and the prisoner's counsel now asked him whether, when he was before the magistrate, he did not say, *whilst under cross-examination by the prisoner's attorney*, that he knew the prisoner was collecting rates after the 24th of June. This question was objected to on the ground that the depositions being referred to, contained no note of any such cross-examination. But Erle, J., was of opinion that the question must be allowed. There did appear to have been decisions the other way, but he had always been of opinion that in principle those decisions were wrong. (c)

(b) *Venafra v. Johnson*, 1 M. & Rob. 316. See *Rowland v. Ashby*, R. & M. N. P. C. 231; *Rex v. Harris*, R. & M. C. C. R. 338, *ante*, p. 508, and *Rex v. Reed*, M. & M. 403.

(c) *Reg. v. Curtis*, 2 C. & K. 763. But see *contra*, *R. v. Thornton*, Warwick Sum. Ass. 1817. *Holroyd, J.*, Russ. on Crimes, 4th ed. p. 489. *Rex v. Wyld*, 6 C. & P. 380. See *ante*, p. 94, note (p), and *Rex v. Edmunds*, 6 C. & P. 164, *ante*, p. 487. With reference to cases where the magistrate has not taken the evidence of a witness in writing, Mr. Philipps observes, 'If the magistrate has not taken in writing the information of a witness, it is clear that no proof can be admitted after his death of what he said before the magistrate; or if the magistrate took the information in writing but irregularly, as, for instance, if the witness was not sworn, or the magistrate did not subscribe, it is equally clear that after the witness's death parol evidence of his information will not be admissible; for such evidence would not have been admissible except by virtue of the statute, nor is it admissible since the passing of the statute, the statutory regulations not having been complied with; the written information is the primary and best proof of the information, and the irregularity of that primary evidence is not a sufficient ground for receiving evi-

dence of a secondary or inferior nature.' In this passage (which does not appear in the 7th edition), the observations must be taken to apply to 'an examination taken in the presence of the prisoner;' and taking them so to apply, it may admit of considerable doubt whether they are well founded. The deposition of a witness is not admissible because it is in writing under the statute, but because it is taken in the presence of the prisoner, and he has had an opportunity of cross-examining the witness; and it is conceived that at common law the rule is well established, that the testimony of a deceased witness, who has been examined upon oath on a former occasion in a proceeding between the same parties, on the same subject-matter, is admissible in a subsequent proceeding between the same parties, and may be proved by any one who heard the evidence given. And this rule extends to criminal as well as civil proceedings. See *ante*, p. 354. Now in all criminal prosecutions the Queen is considered as the prosecutrix, both before the magistrate and on the trial. The parties, therefore, before the magistrate and on the trial are the same, and consequently the evidence of a deceased witness examined in the presence of the prisoner before the magistrate might, at common law, be proved by parol on the trial of the prisoner. But the statute

*(h) Depositions before Coroners.*

The 11 & 12 Vict. c. 42, only applies to depositions before magistrates. *(d)* The 7 Geo. 4, c. 64, s. 4, regulates depositions before coroners, and is not repealed by the 11 & 12 Vict. c. 42.

Depositions  
before  
coroners.

The 7 Geo. 4, c. 64, s. 4, enacts that every coroner, upon any inquisition before him *taken*, whereby any person shall be indicted for manslaughter or murder, or as an accessory before the fact, shall put in writing *the evidence* given to the jury before him, or as much thereof as shall be material: and shall have authority to bind by recognizance all such persons as know or declare anything material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged, *and every such coroner shall certify and subscribe the same evidence*, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court.

There are conflicting authorities upon the question whether a deposition before a coroner is receivable in evidence on the trial of a prisoner when he was not present when the witness was examined. *(e)*

Smith, J., refused to admit in evidence the deposition of a witness taken before the coroner where the prisoner was not present at the inquest when the witness was examined. *(f)* The objection to the admission of a deposition taken by a coroner in the absence of a prisoner is fortified by the 11 & 12 Vict. c. 42, s. 17, expressly requiring the deposition before a magistrate to be taken in the presence of the prisoner, and giving him a full right of cross-examination.

A marked distinction exists between the situation in which a

Distinction  
between the

having required the magistrate to put the evidence in writing, such writing is the best evidence of what the witness said. It is submitted, however, that in case no part of the evidence were taken down, parol evidence would be admissible of what the witness said. The statute has directed the examination of a prisoner to be taken in writing, and yet if that be not done, parol evidence is admissible, because such parol evidence was admissible at common law. *Lambe's case*, 2 Leach, 552. The observations of the judges in this case furnish a strong argument by analogy in support of the view here contended for. It might be further contended that what was said by a witness in the presence of a prisoner before a magistrate was admissible at common law, as a statement made in the prisoner's presence, to which he not only might reply, but which he was called upon expressly to answer. See *Rex v. Edmunds*, 6 C. & P. 164, where Tindal, C. J., admitted evidence of what a deceased

prosecutor swore in the presence of the prisoner on an examination before a magistrate for committing the assault, from the effects of which the deceased died, 'as producing an answer, and like any other conversation.' And see the observations of Parke, B., in *Melen v. Andrews*, *ante*, p. 486. C. S. G.

*(d)* See *R. v. Hazell*, 8 Cox, C. C. 443. *R. v. Cleary*, 2 F. & F. 850, which cases are no doubt incorrectly reported. *R. v. Mooney*, 9 Cox, C. C. 411.

*(e)* Lord Morley's case, Kel. 55. *Thatcher's case*, Sir T. Jones, 53. *Bromwich's case*, 1 Lev. 180. Gilb. Ev. 124. *Rex v. Stockley*, 1 East, P. C. c. 5, s. 78. Bull. N. P. 242. See per Alderson, B. *Reg. v. Austin*, Dears. C. C. 612. 3 T. R. 722. *Garnett v. Ferrand*, 6 B. & C. 611. *Sitts v. Brown*, 9 C. & P. 601. 1 & 2 Ph. & Mary, c. 13, s. 5.

*(f)* *Rex v. Rigge*, 4 F. & F. 1085. This is submitted to be a correct decision. See 1 Taylor, Ev. 459, 4th ed. 2 Stark, Ev. 385. 2 Phil. Ev. 75.

position of a prisoner before a coroner and a magistrate.

prisoner stands when he is before a magistrate on a charge of felony or misdemeanor, and when he is present during the time a coroner is holding an inquest; and this distinction seems to have been acted upon in the following case. Upon an indictment for murder it was proved that a witness who had been examined before the coroner was insane at the time of the trial, and had been so for some time previously; part of his deposition had been taken in the absence of the prisoner, and part in his presence, but the whole was read over in his presence; and it was proposed to give this deposition in evidence, and 1 *Phill. Ev.* 369, 373, referred to, in order to show that the deposition was admissible where the witness had become insane; and *Rex v. Smith*, (g) to show that reading the whole over in the presence of the prisoner rendered it admissible. Park, J. A. J., 'There is one positive objection, that the witness might be insane when he was examined before the coroner. Secondly, the 7 Geo. 4, c. 64, makes a strong distinction between magistrates and coroners. There is a charge made before a magistrate; but I cannot call it a charge before a coroner. In *Rex v. Smith*, the deposition was taken in a common felony, and there the question was, whether a deposition taken on one charge could be evidence on another. I will not receive this deposition. I think it safer not to do so.' (h)

(i) *Where Witness Examined before Trial.*

Examination of witnesses before trial.

By 30 & 31 Vict. c. 35, s. 6, and whereas by the 11 & 12 Vict. c. 42, s. 17, it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said Act, of a witness who is dead, or so ill as to be unable to travel. And whereas it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interest of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: 'Therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able

(g) *Ante*, p. 526.

(h) *Rex v. Charles Wall*, Worcester Sum. Ass. 1830, MSS. C. S. G. The distinction taken by the learned judge seems to deserve much consideration. The ground on which a deposition before a magistrate is admissible is that the prisoner, being there to answer a charge, has the *right* to cross-examine the witnesses. In many *ante* before coroners, even if the prisoner be present, there is

no charge, and perhaps no suspicion, against him, and it may be doubted whether in strictness under any circumstances he has a *right* to cross-examine the witnesses; and if there were no charge in fact made against him, his interference would be an unwarranted interruption of the proceedings. See the observations of Parke, B., in *Melen v. Andrews*, *ante*, p. 455. C. S. G.



and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the Court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough, in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the Court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.'

By sec. 7, whenever a prisoner in actual custody shall have served or shall have received notice of an intention to take such statement as herein-before mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner shall have been conveyed.

An order for the examination of a witness resident in England, but unable from illness to attend the trial, cannot be made by the Court of Queen's Bench in a criminal prosecution, either by the common law authority of the Court, or under the 1 Will. 4, c. 22. (j)

The Court, upon application of the defendant, postponed the trial of an information for a misdemeanor, upon the defendant's

An order for examination of witnesses cannot be granted in a criminal case,

consenting by writing under his own hand to the examination upon interrogatories of a witness for the Crown. (*k*)

(*j*) *Offences committed Abroad—Merchant Shipping Act.*

Depositions  
in India.

Where an indictment or information is exhibited in the Queen's Bench for an offence committed in India, the depositions of the witnesses may be obtained under the provisions of the 13 Geo. 3, c. 63, s. 40 and s. 44. This statute enacts that the Court may award a writ of mandamus to the judges of the courts in India, as the case may require, for the examination of witnesses, who are to be examined publicly in the court, upon oath administered according to the form of their several religions; and these depositions duly taken and returned, in the form prescribed by the Act, are to be allowed, and deemed as good and competent evidence, as if the witnesses had been sworn at the trial, and examined *vivâ voce*. (*l*)

In cases of  
offences com-  
mitted by  
public servants  
abroad.

In the case of a prosecution for an offence committed abroad by any person employed in the public service, the depositions of witnesses resident abroad may be obtained in the way pointed out by the 42 Geo. 3, c. 85.

Merchant  
Shipping Act,  
17 & 18 Vict.  
c. 104.

By the 17 & 18 Vict. c. 104, s. 267, all offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions, by any master, seaman, or apprentice, who is or within three months previously has been employed in any British ship, are to be deemed offences of the same nature, and are to be tried in the same manner and by the same courts as if such offences had been committed within the jurisdiction of the Admiralty of England. See vol. 1, p. 17.

Depositions  
to be received  
in evidence  
when witness  
cannot be  
produced.

By sec. 270, 'whenever in the course of any legal proceedings instituted in any part of Her Majesty's dominions before any judge or magistrate, or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then upon due proof, if such proceeding is instituted in the United Kingdom, that such witness cannot be found in that kingdom, (*m*) or if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in Her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence subject to the following restrictions; (that is to say),

- (1.) If such deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom:

(*k*) *R. v. Morphew*, 2 M. & S. 602. See Anon. 2 Chit. 199.

(*l*) See *Reg. v. Douglas*, 1 C. & K. 670. Lord Denman, C. J.

(*m*) Witnesses, whose evidence had been taken abroad by the British Vice Consul under this section, were officers of a British sailing vessel, which traded between Fayal and Zanzibar, and which

was stated by an officer of the board of trade, from examination of official records, never to have been in this country, held that it was sufficiently proved that the witnesses were not in the United Kingdom, and the depositions were accordingly admitted in evidence. *R. v. Conning*, 11 Cox, C. C. 134. *R. v. Anderson*, 11 Cox, C. C. 154.

- (2.) If such a deposition was made in any British possession, it shall not be admissible in any proceeding instituted in the same British possession :
- (3.) If the proceeding is criminal it shall not be admissible unless it was made in the presence of the person accused :

every deposition so made as aforesaid shall be authenticated by the signature of the judge, magistrate, or consular officer, before whom the same is made ; and such judge, magistrate, or consular officer shall, when the same is taken in a criminal matter, certify, if the fact is so, and that the accused was present at the taking thereof, but it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition ; and in any criminal proceeding such certificate as aforesaid shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified ; but nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or Ordinance of the legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial legislature to make such depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible.'

The prisoner was indicted for larceny alleged to have been committed in February 1852, on board an English merchant vessel, lying in the Bosphorus, of which the prisoner was mate and the prosecutor captain. The principal evidence against the prisoner consisted of the depositions of witnesses still abroad ; and the captain proved that he made a charge against the prisoner of stealing his property before the British Consul at Constantinople. Each witness was sworn and examined by the Consul. Each witness was asked if he could speak English, and if he could not he was sworn in another language ; some were sworn in Greek, which the captain did not understand. They were all sworn on the same book, which was an English bible. The captain did not know the religion of any of the witnesses sworn in the foreign language. The Consul himself took the examinations, and translated each question and answer as it was given, and wrote the depositions in English ; and when the whole of each deposition was taken down it was read to the prisoner, and he was asked what he had to say ; and all he said was that he was not guilty. The captain could not be answerable whether the prisoner was asked whether he would ask any witness any question. He could not ask questions of the witnesses, because he did not understand the language, and he did not tell the Consul anything he wished to be asked of the witnesses. The depositions had been transmitted to the Board of Trade by the Consul, and by that Board to the attorney for the prosecution, who produced them, and the captain proved his signature to his information and examination, which were amongst the depositions. The depositions bore the official seal of the English Consul for Constantinople, and were certified to have been taken in the presence of the prisoner. It was objected, 1, that there was no proof that the witnesses were duly sworn ; 2, that there ought to have been an

Depositions taken by the British Consul at Constantinople. Questions as to swearing the witnesses, translating their statements, giving the prisoner an opportunity to cross-examine, and striking out hearsay from the depositions.

interpreter sworn, and that the Consul could not act as interpreter as he had done, or the depositions ought to have been returned in the language of the witnesses; 3, that the depositions, not being in the language of the witnesses, were not in fact their depositions; 4, that the prisoner was not proved to have had a fair opportunity of cross-examination. For the Crown it was contended that the Merchant Shipping Act, 7 & 8 Vict. c. 112, s. 59, made depositions taken before a Consul abroad and certified under his official seal to be the depositions, and that they were taken in the presence of the accused, admissible in courts of criminal jurisdiction, 'in like manner as depositions taken before any justice of the peace in England,' (n) and that by the Mercantile Marine Act, 13 & 14 Vict. c. 93, s. 115, depositions of any witnesses taken before any consular officer, in any criminal proceeding in the presence of the accused, and certified under his official seal to have been so taken, shall be admissible; and 'any deposition purporting to be so certified shall be deemed to have been so taken and certified as aforesaid, unless the contrary is proved.' (o) That the deposition so certified is the deposition as it stands on the face of the documents. The 7 & 8 Vict. c. 113, s. 1, was also cited. It was replied that the 13 & 14 Vict. c. 93, s. 115, was answered, because it was proved that the depositions were not properly taken; and that the 7 & 8 Vict. c. 112, s. 59, only made the depositions receivable where they would have been receivable if taken in England, and that these depositions would not have been so receivable. Greaves, Q. C., consulted Wightman, J., and they agreed that the proper course would be to admit the depositions, but to reserve the points. The depositions were then put in; but on examination they were found to contain a great deal of hearsay evidence. It was then objected that they were inadmissible on this ground; as it was impossible to separate the good and bad evidence, and the statute had made the depositions evidence, and there was no power to strike out any part of them. Greaves, Q. C., was of opinion that he might run his pen through all the objectionable parts of the depositions, (p) and direct the officer to read the remainder. (q)

(n) This Act is repealed by the 17 & 18 Vict. c. 120.

(o) This Act is also repealed by the 17 & 18 Vict. c. 120.

(p) See *Small v. Nairne*, 13 Q. B. 840. *Hutchinson v. Bernard*, 2 M. & Rob. 1. *Steinkeller v. Newton*, 9 C. & P. 313.

(q) *Reg. v. Russell*, MSS. C. S. G., S. C. 6 Cox, C. C. 60. On attempting to strike out the objectionable parts, it appeared so clear that the depositions had been taken by a person very little conversant with law, that Greaves, Q. C., told the counsel

for the prosecution that it was very difficult to presume that such a person had properly administered the oath or given the prisoner a proper opportunity of cross-examination; and, thereupon, the prosecution was abandoned. Wightman, J., thought that as the witnesses had taken the oath without objection, it might perhaps be presumed that they were properly sworn; but on the other points he entertained grave doubts. Greaves, Q. C., was strongly inclined to think that all the objections were good.

## CHAPTER THE FIFTH.

OF WITNESSES.—WHAT FACTS WITNESSES MAY DISCLOSE, AND WHAT ARE PRIVILEGED COMMUNICATIONS, p. 539.—HOW WITNESSES ARE TO BE EXAMINED, p. 557.—HOW THE CREDIT OF WITNESSES MAY BE IMPEACHED, p. 572.—HOW MANY WITNESSES ARE SUFFICIENT, p. 594.—HOW THE ATTENDANCE OF WITNESSES IS TO BE COMPELLED AND REMUNERATED, p. 595.—OF ACCOMPLICES, p. 600.—AND WHAT WITNESSES ARE COMPETENT TO GIVE EVIDENCE, p. 611.

## SEC. I.

*Of Privileged Communications, and other Matters which a Witness may not Disclose.*

A WITNESS is to be sworn to speak the truth, the *whole* truth, and nothing but the truth. But this form of oath, absolute as it seems, must be taken with an implied reservation, that the witness is not to disclose any facts within his knowledge, which, by the law of the land, founded on considerations of justice, and of public policy, he is forbidden to make known. Of such a nature are professional communications between a client and his solicitor, or counsel, and matters connected with the government of the country. (*a*)

Privileged communications.

The law attaches so sacred an inviolability to communications between a client and his legal advisers, that it will neither oblige nor suffer persons so employed to reveal any facts confidentially disclosed to them at any period of time, neither after their employment has ceased by dismissal or otherwise, nor after the cause in which they were engaged is entirely concluded. (*b*) The privilege of not being examined on such subjects is the privilege of the client, and not of the solicitor or counsel; (*c*) and it never ceases. 'It is not sufficient,' said Mr. J. Buller, (*d*) 'to say that the cause

Between client and solicitor, or counsel.

(*a*) See *Spark v. Middleton*, 12 Vin. Abr. Ev. B. a, 4, p. 38. 1 Keb. 505.

(*b*) Lord Say and Seale's case, 10 Mod. 41. *Wilson v. Rastall*, 4 Term Rep. 753, in the judgment of Buller, J. *Sloman v. Herne*, 2 Esp. N. P. C. 695. *Rex v. Withers*, 2 Campb. 578. *Parkhurst v. Lowten*, 2 Swanst. 194, 221. *Richards v. Jackson*, 18 Ves. 474.

(*c*) 10 Mod. 41. Bull. N. P. 284. But if the client waive his privilege, the witness may be examined. *Merle v. More*, R. & M. N. P. C. 390. But he is not considered as waiving it by calling his solicitor as a witness. 1 Phill. Ev. 445, citing *Waldron v. Ward*, Styl. 449. *Vail-*

*lant v. Dodemead*, 2 Atk. 524.

(*d*) 4 T. R. 759. 'The first duty of a solicitor is to keep the secrets of his clients,' per Gaselee, J. *Taylor v. Blacklow*, 3 B. N. C. 235. He ought, therefore, 'to consider his lips sealed with a sacred silence' as to all confidential communications, per Tindal, C. J., *ibid*. And see *Petrie's case* and *Madam du Barre's case*, cited 5 T. R. 756. A solicitor, therefore, who without his client's consent discloses a confidential communication, is 'guilty of a gross breach of a great moral duty,' per Vaughan, J. *Taylor v. Blacklow*, and is liable to an action for any injury that

is at an end; the mouth of such a person is shut for ever.' And it makes no difference that the client is not in any shape party to the cause before the court. (e)

Rule confined  
to legal ad-  
visers.

The privilege is strictly confined to communications made to counsel, solicitors, and attorneys. (f) No others, however confidential, or whatever be the relation or employment of the party entrusted, are privileged. Therefore all other professional persons, whether physicians, surgeons, or clergymen, are bound to disclose the matters confided to them. (g) Thus where the prisoner, being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted, that confession was permitted by Buller, J., to be given in evidence on the trial, and the prisoner was convicted and executed. (h) So a confession to a Popish priest has been held not to be privileged. (i) So a

may arise from such disclosure. Ibid. Or he may be punished by the court to which he belongs, admitted *arguendo*. Ibid. Two learned barons, however, in *Hibberd v. Knight*, 2 Exc. R. 11, expressed an opinion that if an attorney chose *voluntarily* to disclose a confidential communication, the Court would receive the evidence. These observations were merely *obiter dicta*, and seem to have arisen from an erroneous impression of the facts in *Marston v. Downes*, 6 C. & P. 381. 1 A. & E. 31. The former of these reports correctly states what occurred on the trial, and certainly the attorney did not volunteer any statement of the contents of any deed; and upon the observations in *Hibberd v. Knight* being cited in *Newton v. Chaplin*, 10 C. B. 356, Maule, J., said, 'I presume that the learned barons did not mean that the attorney may in all cases betray his own client.' The matter, however, seems to be set at rest by *Cleave v. Jones*, 7 Exch. 421, as it was there held that an attorney could not give in evidence on his own behalf a confidential communication in an action against his client. In *Volant v. Soyer*, 13 C. B. 231, Jervis, C. J., raised a doubt whether the 14 & 15 Vict. c. 99, had not taken away the ground of objecting to the production of a document on the ground of its having been received professionally; but Maule, J., said that 'The right, which a client has always enjoyed, of being protected from a breach of professional confidence, remains the same. I think the protection still continues unimpaired, so far as regards the prohibition to the attorney to give evidence of the contents of, or to produce documents belonging to, his client.'

(e) *Rex v. Withers*, 2 Campb. 578.

(f) 4 T. R. 758. *Rex v. Duchess of Kingston*, 11 St. Tr. 246.

(g) Ibid.

(h) *Rex v. Sparkes*, cited in *Du Barré v. Livette*, Peake R. 78, in which latter case Lord Kenyon said he should have paused before he admitted such evidence. But the point, that confessions to clergymen are not privileged, has been fully

established by the decision in *Rex v. Gilham*, *ante*, p. 456. In *Broad v. Pitt*, 3 C. & P. 518, Best, C. J., after recognising this decision, said, 'I, for one, will never compel a clergyman to disclose communications made to him by a prisoner, but if he chooses to disclose them I shall receive them in evidence.' In *Reg. v. Griffin*, 6 Cox, C. C. 219, the chaplain of a workhouse was called to prove certain conversations he had had with the prisoner as to injuries she had inflicted on her child, for whose murder she was being tried, when he visited her as her spiritual adviser; Alderson, B., 'I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is because, without an unfettered means of communication, the client would not have any proper legal means of assistance. The same principle applies to a person, deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule, but I think such evidence ought not to be given.' No case was cited.

(i) *Butler v. Moore*, M'Nall. Ev. 253, as cited 1 Phill. Ev. 165. In *Reg. v. Hay*, 2 F. & F. 4, Hill, J., committed a Roman Catholic priest for refusing to state from whom he received a stolen watch, which he stated he had received in connexion with the confessional. But the priest was not asked to disclose anything that had been stated to him in the confessional, and therefore no question arose as to that. Where a witness had taken an oath to a prisoner that he would not reveal what the prisoner should tell him, Pattenon, J., said, 'These oaths are very wrong and wicked, but still they are not binding, and every person, except counsel and attorneys, is compellable to reveal what they may have heard; and counsel and attorneys are only excepted because it is absolutely necessary, for the sake of their clients, that communications to them should be protected;' and admitted the confession. *Rex v. Shaw*, 6 C. & P. 372.

banker, (*j*) steward, servant, or private friend, is bound to disclose a communication, however confidential. (*k*) And where a clerk to the commissioners of the property-tax was required to prove the defendant to be a collector, and he objected, because he had taken an oath of office not to disclose what he should learn as clerk concerning the property-tax, except with the consent of the commissioners, or by force of an Act of Parliament, it was held that he was bound to give his testimony, and that the evidence which a witness was called upon to give in a court of justice was to be considered as an implied exception in the Act. (*l*) An arbitrator may be called to prove what matters were claimed before him on a reference: (*m*) he cannot, however, be admitted or called on to give evidence of any concessions made by one party during the reference for making his peace and getting rid of the suit, although, as to regular admissions by the parties, there is no objection to his testimony. (*n*) A person who acts as an interpreter, (*o*) or agent, (*p*) between the solicitor and his client, or the solicitor's clerk, (*q*) cannot be called on to reveal a confidential communication; for they stand precisely in the same situation as the solicitor himself, and are considered as his organs.

Arbitrator.

Interpreter.  
Agent.  
Clerk.

It has been held that a person who is consulted confidentially on the supposition of his being a solicitor, when in fact he is not one, is compellable to answer. (*r*) And propositions which the solicitor of one party has been professionally entrusted to make to another party may be proved by another witness who was present when they were delivered. (*s*) And a solicitor may be called upon by a plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as solicitor for the defendant. (*t*) So where the plaintiff and defendant went together to the plaintiff's attorney's office, and had a conversation in the presence of the attorney's clerk, it was held that this conversation was not a privileged communication, but might be proved by the clerk, and that a letter written by the clerk in consequence of instructions given by the defendant in the course of that interview was admissible, as that was an act done. (*u*) So where an act is done in pursuance of a bargain between two parties and in the presence of the solicitors of each of them, the communication made by one party to his solicitor, relating to that act in the presence of the other party and his solicitor is not privileged. The defendant, in the presence of his solicitor,

Person consulted as an attorney, not being one.

Communications in the presence of both parties.

(*j*) *Lloyd v. Freshfield*, 2 C. & P. 329.

(*k*) *Valliant v. Dodemead*, 2 Atk. 524.

(*l*) *Falmouth v. Moss*, 11 Price, 455.

(*m*) *Lee v. Birrell*, 3 Campb. 337.

(*n*) *Martin v. Thornton*, 4 Esp. 181, by Lord Alvanley. *Duke of Buccleuch v. Metropolitan Board of Works*, 41 L. J. Ex. 137.

(*o*) *Slack v. Buchanan*, Peake N. P. C. 6. *Westlake v. Collard*, Bull. N. P. 236. *Martin v. Thornton*, 4 Esp. 181. Bull. N. P. 284.

(*p*) *Du Barré v. Livette*, Peake N. P. C. 78, S. C. 4 T. R. 756.

(*q*) *Parkins v. Hawkshaw*, 2 Stark. 239.

(*r*) *Taylor v. Forster*, 2 C. & P. 195. See *Webb v. Smith*, 1 C. & P. 33.

(*s*) *Fountain v. Young*, 6 Esp. 113; *sed quere*, whether this would be so where the client has acted *bond fide* and without negligence.

(*t*) *Gainsford v. Grammar*, 2 Campb. 10.

(*u*) *Griffith v. Davies*, 5 B. & Ad. 502. And per Parke, J., 'This is not a confidential disclosure, but an open communication from one adversary to another, witnessed by the attorney of one party. In *Gainsford v. Grammar*, the Lord Chief Justice might properly reject the attorney's evidence of what his client said to him, but not his statement of what he himself afterwards said to the opposite party.'

(*v*) *Shore v. Bedford*, 5 M. & G. 271.

Solicitor not consulted as such.

Where two parties employ the same solicitor.

What sort of communications between solicitor and client are privileged.

and one Clark and his solicitor, Vallance, signed a note, and it was held that Vallance might prove that the note was given by the defendant to Clark in consideration of his withdrawing all opposition to the defendant's passing his last examination as a bankrupt. (*w*) And communications made to a person, by profession a solicitor, but not employed as such in the particular business which is the subject of inquiry, are not privileged, though they may have been made confidentially. (*x*)

Where two parties employ the same solicitor, a communication by one to him in his common capacity is not privileged, but may be used by the other. (*y*) And where a party employs a solicitor who is also employed by the other side, the privilege is confined to such communications as are clearly made to him in the character of his own solicitor. (*z*)

It now remains to be considered what sort of communications made to a solicitor or counsel by his client are entitled to protection. A very eminent writer on the Law of Evidence (*a*) has laid it down, that the privilege of the client is not confined to cases only where he has employed the solicitor in a suit or cause, but extends to all such communications as are made by him to the solicitor in his professional character and with reference to professional business. And this opinion has been confirmed by a case (*b*) where it was held that an attorney, to whom an application had been made to draw an assignment of goods, which he declined to do, could not be allowed to disclose that circumstance, a question having arisen whether an assignment subsequently drawn by another attorney, was fraudulent. And in that case Richardson, J., said, that if an attorney were to be consulted on the title to an estate, he would not be at liberty to disclose any information thus communicated to him to the prejudice of his client. And Sir J. Leach, V. C. in *Walker v. Wildman*, (*c*) considered the protection to extend to every communication made by the client to his counsel or attorney or solicitor for professional purposes. (*d*) And al-

(*w*) *Weeks v. Argent*, 16 M. & W. 817.

(*z*) *Wilson v. Rastall*, 4 T. R. 753, 760, and see *post*, p. 552. In a trial at Nisi Prius at Westminster, an attorney who had drawn an agreement between a sheriff and his under-sheriff, being produced to prove a corrupt agreement between them, was not compelled to discover the matter, and per Holt, C. J., it seems to be the same law of a scrivener; and he cited a case where upon a covenant to convey as counsel shall advise, *et consilium non dedit advisamentum* being pleaded, conveyances made by the advice of a scrivener being tendered and refused, was allowed to be good evidence upon this issue; for he is a counsel to a man with whom he will advise, if he be instructed and educated in the way of practice, otherwise of a gentleman, parson, &c., *Anonymous Skinn.* 404. And in *Turquand v. Knight*, 2 M. & W. 98, it appeared that Knight had applied to an attorney to procure him a loan of money, and it was contended that where an attorney was employed to raise money, that was not such an employment as

brought him within the rule; and that here he was acting as a scrivener only. Lord Abinger, C. B., said, 'As to the point of this document being brought to him in the character of a scrivener, Lord Nottingham laid it down that he would not compel a scrivener to disclose the communications made to him.' *Harvey v. Clayton*, 2 Swanst. 221 *n*.

(*y*) *Baugh v. Cradocke*, 1 M. & Rob. 182, *Patteson, J. Cleve v. Powell*, 1 M. & Rob. 228, Lord Denman, C. J., saying, 'either party has a right to the disclosure.'

(*z*) *Perry v. Smith*, 9 M. & W. 681, per Parke, B.; in which case it was held that the same attorney having been employed upon the sale of an estate by the vendor and purchaser, a communication from the purchaser to the attorney, asking him for time to pay the purchase money, was not privileged. See Griffith *v. Davies*, per Parke, J., *supra*, note (*t*).

(*a*) *Phill. Ev.* 7th ed. 143.

(*b*) *Cromack v. Heathcote*, 2 B. & B. 4.

(*c*) 6 Madd. 47.

(*d*) And from the cases of *Brard v.*



though Lord Tenterden, C. J., on several occasions, both before and since the case of *Cromack v. Heathcote*, expressed at Nisi Prius a contrary opinion, (e) yet it is now clearly settled that the privilege of professional confidence is not limited to cases in which a suit is in contemplation, (f) but that the client's privilege extends much beyond communications in respect of a suit. (g) Thus, where it was proposed to ask an attorney whether a person had not applied to him to draw a conveyance, Parke, J., refused to allow the question to be asked, saying, 'I am of opinion that the privilege applies to all cases where the client applies to the attorney in his professional capacity, and an application to draw a deed is, I think of that description. (h)

In one case, (i) Alderson, B., said, 'The rule seems to be correlative with that which governs the summary jurisdiction of the courts over attorneys. In *Ex parte Aitken*, (j) that rule is laid down thus: "Where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him; but where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction." So where the communication made relates to a circumstance so connected with the employment as a solicitor, that the character formed the ground of the communication, it is privileged from disclosure.' Thus communications made in relation to the sale and purchase of estates are protected; a solicitor, therefore, who has been employed in the purchase and sale of estates, cannot be asked as to a communication made to him by the party who employed him. (k) So a solicitor who, being resorted to by a borrower to raise money for him, peruses on the part of the proposed lender the abstracts of the borrower, is not allowed to give evidence concerning them. (l) But where a treaty had been entered into by B. with E. for the exchange of lands, and an abstract was handed by the attorney of E. to the attorney of B., and he compared it with the title deeds, and the attorney of B. on being called upon to produce the abstract stated that his client claimed to

The rule is correlative with that which governs the summary jurisdiction of the courts over solicitors.

On sale of estates.

Ackerman, 5 Esp. 120, and Robson v. Kemp, 5 Esp. 52, it appears that Lord Ellenborough, C. J., was of the same opinion.

(e) Wadsworth v. Hamshaw, 2 Brod. & Bing. 5, note (a). Manning's Dig. 374. Williams v. Mundie, R. & M. N. P. C. 34.

(f) Phill. Ev. 168.

(g) The opinion of Lord Chancellor Brougham, Tindal, C. J., Lord Lyndhurst, C. B., and Parke, B., in *Greenough v. Gaskell*, Mylne & K. 98, as stated 4 B. & Ad. 876, per Parke, B.

(h) Doe d. Sheppard v. Harris, 5 C. & P. 592. The learned Baron also held in the same case that the attorney could not be asked whether the party had asked his advice for a lawful or for an unlawful purpose, saying, 'there is a great deal of difficulty in the witness's disclosing whether the conference between him and his client was for a lawful or unlawful

purpose, without one being told what it was. It might be that the party asked if a particular thing could legally be done.' The learned Baron also said, that *Williams v. Mundie* was overruled by *Greenough v. Gaskell*. In *Bowman v. Norton*, 5 C. & P. 177, Tindal, C. J., held that a conversation between a client, who afterwards became bankrupt, and his attorney's clerk, on the subject of his affairs, was a privileged communication, and could not be given in evidence in an action by his assignees for the purpose of showing his motives.

(i) *Turquand v. Knight*, 2 M. & W. 98.

(j) 4 B. & Ald. 47. See also *Ex parte Yeatman*, 4 Dowl. P. R. 304.

(k) *Mynn v. Jolliffe*, 1 M. & Rob. 326, Littledale, J.

(l) Doe d. Peter v. Watkins, 3 Bing. N. C. 421. And see *Taylor v. Blacklow*, 3 Bing. N. C. 225.

be entitled to the property under the contract of exchange, and that he held the abstract as part of the evidence of the contract, and had not applied to his client for leave to produce the abstract, but was ready to do so, if the judge thought he ought, and the judge answered that there appeared no sufficient reason why he should not, it was held that the abstract was properly produced. (*m*)

Attorney not bound to produce or state the contents of any document;

except for the purpose of identification.

A solicitor is not bound to produce, or to answer any questions concerning the nature or contents of, a deed or other instrument intrusted to him professionally by his client; and the judge has no right to look at the instrument to see if the objection to produce it or to disclose its contents be well founded or not; for the mere statement of the solicitor that he received the document from his client professionally is enough to protect it. (*n*) But where an attorney refused to produce a deed on the ground that it was one of his client's title-deeds, and his clients had instructed him not to produce it, the privilege was allowed; but the judge directed him to produce the deed and permit a witness to read the indorsement on it, but not the deed itself, for the purpose of identification; it was held that the judge did right, for the privilege is only not to produce the instrument for the purpose of disclosing its contents. (*o*)

The privilege extends to all knowledge, however obtained.

A communication made to a solicitor, if confidential, is privileged in whatever form made; if it would be privileged when communicated in words spoken or written, it will be privileged equally when conveyed by means of sight instead of words. (*p*) Where, therefore, the attorney of a defendant, at the suggestion of his counsel in consultation, obtained a deed from the defendant, and in the presence of his counsel, and for their information, ascertained its contents, it was held that he was not bound to state its contents. (*q*) So letters between a defendant and her country or town solicitors, and letters between her country and town solicitors, are privileged. (*r*)

Attorney not allowed to produce documents, &c., deposited with him by his client.

A solicitor will not be allowed to produce a deed which has been deposited with him confidentially in his professional character; and if the deed has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received. Thus a copy of a deed which had been obtained from one who had formerly been entrusted with the original in his profes-

(*m*) *Doe v. Lord Egremont v. Langdon*, 12 Q. B. 711.

(*n*) *Volant v. Soyer*, 13 C. B. 231.

(*o*) *Phelps v. Prew*, 3 E. & B. 430. Coleridge, J., said that the process of identification might at times involve a disclosure of the contents of the instrument; and when it did it was objectionable. But in this case it did not involve any disclosure of the contents, and was like the case of disclosing a blot of red ink on the back of a deed.

(*p*) 1 Phill. Ev. 169, citing *Robson v. Kemp*, 5 Esp. R. 54, where it was held that an attorney could not give evidence as to the fact of the destruction of an instrument which he had been admitted in confidence to see destroyed. In *Wheatley v. Williams*, 1 M. & W. 533, it was held that an attorney is not compellable to state, when examined as a witness, whether a document shown to him by his

client in the course of a professional interview was then in the same state as when produced on the trial, *e.g.*, whether it was then stamped or not; and per Lord Abinger, C. B., 'Suppose an attorney when searching for a deed belonging to his client, found another deed which might operate to the client's prejudice, can it be said that he would be bound to produce it? If, therefore, a document be exhibited to an attorney, in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the confidential communication.'

(*q*) *Davies v. Waters*, 9 M. & W. 608.

(*r*) *Reid v. Langlois*, 1 Mac. & Gord. 627. *Goodall v. Little*, 1 Sim. N. S. 155. And see *Penruddock v. Hammond*, 11 Beav. 59, *Blenkinsop v. Blenkinsop*, 10 Beav. 277, as to cases for counsel, &c. *Vent v. Pacey*, 4 Russ. 193.

sional character as a solicitor, is not good secondary evidence against his client. (s) But this case has been doubted. (t) Where a vendor had a draft of conveyance made by his own attorney, from which the deeds were afterwards prepared, and the attorney was paid for this business by the vendor and purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft, which remained afterwards with the vendor's attorney; the Court of King's Bench held that such draft was confidentially deposited with the latter by the purchaser as well as the vendor, and could not be produced on a trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney. (u) And even if a solicitor has on one occasion produced a deed entrusted to him by a client under the erroneous compulsion of one tribunal, he will not be bound to produce it before another tribunal. (v) So where an attorney, attending under a subpoena *duces tecum*, stated that he had a deed in his custody as attorney, but that his clients had instructed him not to produce the deed, which was one of their title-deeds, and he, therefore, refused to produce it, it was held that he was not bound to produce it. (w) So where upon an indictment for perjury alleged to have been committed on the trial in a County Court with reference to the writing on a paper then produced, an attorney was called under a subpoena *duces tecum* to produce such paper; he had been attorney for the prisoner in the County Court, and had received this paper from the prisoner for the purpose of conducting the case in County Court as his attorney, and he claimed a lien on the paper for his costs; Coltman, J., held that the attorney's possession was the possession of the prisoner, and that he ought not to produce it. (x)

Paper received for the purpose of a cause.

So on the prosecution for the forgery of a promissory note, an attorney who had acquired possession of the note in his professional character from the prisoner was not compelled or allowed to produce it, although subpoenaed so to do, and although he was not employed professionally for the prisoner at the trial, but was originally consulted about the note, for the purpose of suing the party upon it whose name was charged to be forged. (y) But this case has since been doubted. On an indictment for forging a will, a solicitor stated that he was applied to by the prisoner to act as his solicitor in raising some money; and that he was the solicitor of the prisoner in raising the money as well as of Williams in the

Forged note.

Forged will.

(s) *Fisher v. Heming*, MS. 1 Phill. Ev. 170, Bayley, J. See also *Copeland v. Watts*, 1 Stark. N. P. C. 93.

(t) 'I have always doubted the correctness of that ruling. Where an attorney intrusted confidentially with a document, communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?' per Parke, B., in *Lloyd v. Mostyn*, 10 M. & W. 478, where it was held that a copy examined with a bond, produced for the purpose of admission under a judge's order, was admissible, although the attorney who held the bond

was not bound to produce it on the trial.

(u) *Doe d. Strode v. Seaton*, 2 A. & E. 171.

(v) *Nixon v. Mayoh*, 1 M. & Rob. 76.

(w) *Phelps v. Prew*, 3 E. & B. 431.

(x) *Reg. v. Hankins*, 2 C. & K. 823.

(y) *Rex v. Smith*, *cor.* Holroyd, J., MS. 1 Phill. Ev. 171. In *Weeks v. Argent*, 16 M. & W. 817, Parke, B., said, 'All that Rex v. Smith decides is that the possession of the attorney for the prisoner was the possession of the prisoner, so that if the prisoner did not suffer him to produce it, secondary evidence of it would have been admissible for the purposes of criminal justice.' See 24 & 25 Viet. c. 93, s. 46, noticed *post*, p. 548.

advance of it; that the prisoner made an application to him; it was objected that this was a privileged communication, as the party was the solicitor for the prisoner; and the preceding case was relied upon. Patteson, J., 'I think that the case cited is not law, (z) and that the solicitor may be examined to show what was the transaction between the parties, and what led to that transaction; but I will reserve the point for the consideration of the judges, if I should hereafter think it necessary to do so.' The witness then stated that the prisoner proposed to mortgage some land, which had been left him by his aunt, and that the prisoner told him the title deeds had been burnt, but that he gave him a paper which he said was his aunt's will. It was again objected that, as the will had been delivered to the witness by the prisoner while he was attorney for the prisoner, he ought not to produce it; Patteson, J., 'I think he is bound to do it.' The will was produced and read, and it was the will alleged to be forged. (a)

If a person applies to a solicitor to advance him money on mortgage, and deposits a forged document with him as part of the title to the property, this is not a privileged communication.

Upon an indictment for forging a will, it appeared that the wife of the prisoner, by his direction, took a will purporting to be the will of W.W. (not the will in question, but another forged will) to Mr. Cadle, a solicitor, and asked if he could advance her husband some money upon mortgage of property under the will of her father, W.W. She left the will with Mr. C., who afterwards returned it to her husband, and communicated to him what had passed with his wife. Mr. C., while the will was in his possession, had made an exact copy of the will, and the prisoner had had notice to produce it, and, not producing it, the copy was tendered in evidence. Mr. C. said, that at the time the will was produced to him he was not acting as attorney of the prisoner, and did not charge for the interview, but if he had been acting as his attorney he should have made a charge; if he had found the security sufficient, he should have advanced the money; he was in no other way acting as the prisoner's solicitor. It was objected that the interview with the prisoner's wife was confidential, and that the conversation, which then took place, and the copy of the will, were not admissible; but the evidence was admitted. And, upon a case reserved, the judges held that the communication was not privileged. (b)

If a forged will be delivered to a

The prisoners were convicted of uttering a forged will. One of them having possessed himself of some title deeds from the house

(z) In *Reg. v. Tylney and Tuffs*, 1 Den. C. C. 319, Patteson, J., said that this observation was too strong, and that *Rex v. Smith* and *Reg. v. Avery* were distinguishable.

(a) *Reg. v. Avery*, 8 C. & P. 596. The indictment charged the intent to be to defraud Williams and the attorney in different counts. The prisoner was convicted, but no sentence passed on the indictment for forgery, the prisoner being sentenced on an indictment charging the transaction as a false pretence. Mr. Philipps, vol. I, p. 171, observes that 'the distinction between this case and *Rex v. Smith* is obvious. In *Reg. v. Avery*, the prisoner deposited the instrument in the hands of his solicitor, not with reference to a suit, nor with reference to any transaction

action resting solely between themselves, but for the purpose of a money transaction between himself and a third person, and to be disclosed and communicated to that person. In the case of *Rex v. Smith*, on the contrary, the instrument was deposited with the solicitor for the purpose of a suit in which he consulted him professionally as a matter in confidence between him and his solicitor, and solely for his own interest. The two cases, therefore, are not inconsistent, and the one does not overrule the other.'

(b) *Reg. v. Farley*, 1 Den. C. C. 197, 2 C. & K. 313. Pollock, C. B., in the course of the argument, asked, 'Do you mean that a man may always apply to an attorney to discount a forged bill with impunity?'

of the deceased, placed the forged will in the midst of them, and sent them to his attorney for the ostensible purpose of asking his advice upon the title deeds; but as Pollock, C. B., clearly thought, in order that the attorney might find the will among them, and act upon it, which he did by producing it on various occasions in the presence of such prisoner. It was afterwards produced before the magistrates at the preliminary investigation, and returned to the attorney. He was called upon the trial, and required to produce the will, which he did without objection, and handed it to the officer of the court. It was objected that it was a privileged communication, and ought not to be read; but Pollock, C. B., overruled the objection, and, upon a case reserved, the judges thought that the will was not put into the attorney's hands in professional confidence, and that the rule as to privileged communications between attorney and client did not apply. (c)

So where on an indictment for forging the will of W. Tuffs, an attorney, who had possession of the will, stated that the prisoner had consulted him, on a previous occasion, about some professional matters, on which he had advised her, though he had never made any charge for that advice, and that she afterwards brought a paper (the forged will) with her, and he judged from what she said that she came to consult him as to that document; that it was for the purpose of enforcing that document: he said further, 'she did not come to consult me as to what her rights were, but that I might enforce her rights under it.' It was objected on behalf of the prisoner that the attorney could not be allowed to produce the document; but Coltman, J., considered the effect of the attorney's evidence to be, that the document was committed to him, not to be kept as a confidential deposit, but in order that it might be exhibited in court for the purpose of enforcing her rights, and thought it, under the circumstances, advisable to receive the document in evidence with a view of obtaining the opinion of the judges on the point; which was reserved, but no opinion was given upon it, as the case went off on another point. (d)

Where on an indictment for forgery it appeared that the prisoner had charged one Brittain with forgery, and had employed an attorney to conduct that prosecution, who had been served with a subpoena *duces tecum* to produce certain documents in this prosecution, and who, being called as a witness, stated that the documents had come into his possession as attorney for the prosecution in *Reg. v. Brittain*, in which case he was retained by the prisoner as attorney for the prosecution. It was urged for the Crown that an

solicitor, in order that he may act upon it, this is not privileged.

If a forged will is given to a solicitor to enforce the party's rights, *seem* that it is not privileged.

Solicitor compelled to produce forged documents.

(c) *Reg. v. Hayward*, 2 C. & K. 234. S. C., as *Reg. v. Jones*, 1 Den. C. C. 166.

(d) *Reg. v. Tylney and Tuffs*, 1 Den. C. C. 319. See *ante*, vol. 2, p. 685. Parke, B., observed, 'the expression "for the purpose of enforcing the document" seems ambiguous. Suppose it was delivered to the attorney for the express purpose of showing that the tenant in possession might give up the possession to the forger of the will? Supposing, on the other hand, a man gives his title deeds to an attorney to enable him to

bring an action of ejectment, he ought not, perhaps, to show them adversely to his client.' In the report of this case, 3 Cox, C. C. 160, Wilde, C. J., said, 'If title deeds are intrusted to an attorney as an attorney, can it be doubted that he is not at liberty to produce them?' Lord Denman, C. J., 'But if a forged and false instrument is given to an attorney, ought he not to take it to a magistrate?' Wilde, C. J., 'I apprehend the magistrate could not receive the statement.'

attorney cannot refuse to produce documents deposited with him by a person charged with an offence in respect of such documents, otherwise justice might be defeated. Were the privilege here sought to be established granted, conviction might be impossible, by reason of the non-production of the forged document; and Willes, J., held that the documents must be produced. (e)

The preceding case occurred after the passing of the 24 & 25 Vict. c. 98, s. 46, by which any justice may issue a warrant to search for any forged instrument whatsoever; and, though no reference is reported to have been made in that case to that clause, it may possibly have influenced the decision; for as a forged instrument may be seized under that clause, it is difficult to see how a solicitor can have such a possession of it as will privilege him from producing it. (f)

A very important question arises, where a solicitor has been employed for an illegal purpose, whether any communication in furtherance of such purpose can be considered as privileged; and the authorities appear to be very strong that no privilege exists in such cases. (g)

(e) Reg. v. Brown, 9 Cox, C. C. 281, May, 1862. The prisoner was undefended, no case was cited and the report does not state what the documents were.

(f) See the clause and the note to it, vol. 2, p. 736.

(g) In the great case of *Annesley v. The Earl of Anglesea*, 17 How. St. Tr. 1139, p. 1226, *et seq.*, it appeared that Giffard had been frequently employed as attorney for Lord Anglesea, but that for some time another firm had been his attorneys, and that on the 1st of May Annesley had shot a man, on whom an inquest was held on the 4th of May, and a verdict of murder found against Annesley, for which he was afterwards tried and acquitted (see *Rex v. Annesley*, 18 How. St. Tr. 1094), and that on the 2nd of May Lord Anglesea had sent for Giffard, and directed him to collect evidence, and to carry on the prosecution, and to follow the directions of the other attorneys, who had advised him not to appear in the prosecution for fear of its hurting him in the cause which was coming on between him and Annesley; and that Lord Anglesea, either then or afterwards, but it does not clearly appear when, told Giffard that he did not care if it cost him 10,000*l.* if he could get Annesley hanged, for then he should be easy in his title and estates, and he understood that it was his resolution to destroy him if he could. It was supposed at the time that Annesley intended to sue for the title and estates of Lord Anglesea, and this was to prevent it. Giffard conducted the prosecution. The question was, whether the statement as to the 10,000*l.* was privileged; for Annesley it was contended that it was not. Serjt. Tisdall said, 'If he is employed as an attorney in any unlawful and wicked act, his duty to the public

obliges him to disclose it. No private obligations can dispense with that universal one, which lies on every member of society to discover every design which may be formed, contrary to the laws of society, to destroy the public welfare. For this reason I apprehend that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client: but in this case the witness was not attorney to Lord Anglesea in any case relative to his testimony.' The court held that the statement was not privileged, and seem to have adopted the view urged by counsel. C. B. Bowes said, 'As this was in part a wicked secret, it ought not to have been concealed; though, if earlier disclosed, it might have been more for the credit of the witness.' Mounteney, B., after repeating the statement, said, 'Let us consider the doctrine, that such a declaration made by any person to his attorney ought not by that attorney to be proved. A man (without any natural call to it) promotes a prosecution against another for a capital offence—he is determined at all events to get him hanged—he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have mentioned (the meaning and intention of which, if the attorney has common understanding about him, it is impossible he should mistake)—he happens to be too honest a man to engage in such an affair—he declines the prosecution—but he must never discover this declaration because he was retained as attorney. The prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably

As to the effect of the 24 & 25 Vict. c. 98, s. 46.

Solicitor employed for an illegal purpose.

In the case of *Rex v. Dixon*, (*h*) it was held by Lord Mansfield, and the rest of the court, that an attorney, who had been served with a *subpoena duces tecum* out of the Crown Office to produce certain vouchers which his client, a Mr. Peach, had exhibited and relied upon before a Master in Chancery, and which subpoena had been served on the attorney in order to found a prosecution for forgery against his client, was not bound to produce these required vouchers. (*i*) And the attorney-general, if questioned as to the reasons for filing an *ex officio* information, may refuse to answer. (*j*)

Attorney-General.

The privilege does not attach to everything which the client says to his solicitor; the test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the solicitor is employed; if it is necessary it becomes privileged, (*k*) but if it is not it may be disclosed. Thus a solicitor

How far the privilege extends, and as to what facts a solicitor may be examined.

secret; at last he finds an attorney wicked enough to carry this iniquitous scheme into execution, and after all none of these persons are to be admitted to prove this in order either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property. Is this law? Is this reason? I think it is absolutely against both.' In *Russell v. Jackson*, 9 Hare, 387, an attorney had been instructed to prepare a will by a testator to leave his property for the purpose of establishing a school for the education of children in the doctrines of socialism, and the attorney intimated doubts whether the law would permit such a disposition, and the testator then said that his two devisees knew his intentions, and, having confidence in them, he would leave his property to them, being satisfied that they would carry out his intentions; and the question was whether these instructions were privileged; and it was held that they were not; and V. C. Turner said, 'Can it then be said that the communication should be protected, because it may lead to the disclosure of an illegal purpose? I think that it cannot; and that evidence which would otherwise be admissible cannot be rejected on such a ground. On the contrary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. Where a solicitor is party to a fraud, no privilege attaches to the communications with him on the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law.' In *Equity* any person standing in the confidential relation of a clerk or servant may be prohibited, subject to certain exceptions, from disclosing any part of the transactions of which he so acquires a knowledge; and in *Gartside v. Outram*, 26 Law J. Chanc. 113, the plaintiffs brought a bill for an injunction to restrain their

former clerk from disclosing any of their transactions; the clerk, by his answer, stated that the plaintiffs carried on their business in a fraudulent manner, specifying the particulars, and filed interrogatories for the examination of the plaintiffs, containing questions as to the alleged fraudulent transactions; and it was held that the plaintiffs were bound to answer these interrogatories. Wood, V. C.: 'The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist.' Having referred to *Reg. v. Avery*, *ante*, p. 546, and said that, 'If there is a discrepancy of authority upon the subject, I much prefer the decision of Patteson, J.,' Wood, V. C., next cited *Annesley v. The Earl of Anglesea*, and spoke of it as a case, 'in which the point is put so ably and clearly by the counsel in argument, that I adopt that argument as the best expression of my opinion,' and then read Serjt. Tisdall's argument, *supra*, and the parts of the judgments of C. B. Bowes and B. Mounteney, *supra*.

(*h*) 3 Burr, 1687, cited by Lord Ellenborough in *Amey v. Long*, 9 East, 485.

(*i*) See also *Laing v. Barclay*, 3 Stark. 38; *Harris v. Hill*, 3 Stark. N. P. C. 17; *S. C.* 1 Dowl. & Ry. N. P. C. 13; *Rex v. Upper Boddington*, 8 Dowl. & Ry. 726.

(*j*) *Rex v. Horne*, 11 St. Tr. 283.

(*k*) *Per curiam* Gillard v. Bates, 6 M. & W. 547. There an attorney was sued for work and labour in issuing an execution, and the defence was that he was employed by B., and not by the defendant, and it was held that the plaintiff's agent, an attorney, might be asked whether the plaintiff had not said, on introducing B. to him, that he, the plaintiff, had been employed by B. to issue the execution in question, and that this was not a privileged communication.

may be examined like any other witness to a fact which he knew before his retainer, that is, before he was addressed in his professional character (*l*) or where he has made himself a party to the transaction, (*m*) or where he is questioned to a collateral fact which he might have known without being intrusted as the solicitor in the cause. (*n*) Thus he may prove his client's handwriting, though the knowledge was obtained from witnessing his execution of the bail bond in the action. (*o*) And he may be called to prove his client's identity. (*p*) And if he is a subscribing witness to a deed he may be examined concerning the execution. (*q*) But he ought not to be permitted to discover any confessions which his client may have made to him on such head. (*r*) So if the solicitor were present when his client was sworn to an answer in chancery, upon an indictment for perjury, he would be a witness to prove the fact of taking the oath, for it is a fact in his own knowledge, and no matter of secrecy committed to him by his client. (*s*) So the solicitor of one of the parties may be examined as to the contents of a written notice which had been received by him in the course of a cause, requiring him to produce papers; (*t*) for the privilege only extends to confidential communications from the client, and not to those from collateral quarters, although made to him in consequence of his character as a solicitor. (*u*) So a solicitor conducting a cause in court may be called as a witness by the opposite side, and asked who employs him, in order to show the real party, and so let in his declarations. (*v*) So a solicitor may be called and asked whether he has not a particular document in his possession, in order to let in secondary evidence, if the document is not produced. (*w*) And where an action on a promissory note had been compromised by the defendant's paying part of the money and giving a warrant of attorney to confess judgment for the residue, and in the interval between the time when the warrant of attorney was given, and the time the money became due according to the

(*l*) *Cuts v. Pickering*, 1 Vent. 197. Lord Say and Seale's case, 10 Mod. 41. 1 Phill. Ev. 166.

(*m*) *Duffin v. Smith, Peake*, N. P. C. 108. *Robson v. Kemp*, 5 Esp. 52.

(*n*) Bull. N. P. 284. 1 Phill. Ev. 175.

(*o*) *Hurd v. Moring*, 1 C. & P. 372, Abbot, C. J.

(*p*) *Studdy v. Saunders*, 2 Dow. & Ry. 347; but see *Parkins v. Hawkshaw*, 2 Stark. N. P. C. 239.

(*q*) *Doe v. Andrews*, Cowp. 846. *Robson v. Kemp*, 4 Esp. 235. S. C. 5 Esp. 52. *Weeks v. Argent*, 16 M. & W. 817. For if an attorney puts his name to an instrument as a witness, he makes himself thereby a public man, and is no longer clothed with the character of an attorney: his signature binds him to disclose what passed at the execution of the instrument, but not what took place in the concoction and preparation of the deed: by Lord Ellenborough, 5 Esp. 54.

(*r*) Bull. N. P. 284.

(*s*) Bull. N. P. 284, 285. But he is not bound to speak of the particular

a bill of exchange intrusted to him by his client; for the existence of such a bill is not a mere fact, but consists of circumstances, which he came to be acquainted with from the delivery of the bill to him by his client. *Brard v. Ackerman*, by Lord Ellenborough, 5 Esp. 120.

(*t*) *Spenceley v. Schulenburg*, 7 East, 357.

(*u*) So an admission of a debt made by a solicitor to the adverse party, by direction of his client, is not privileged. *Turner v. Raiton*, 2 Esp. 474.

(*v*) *Levy v. Pope*, Moo. & Mal. 410, Parke, J.

(*w*) *Coates v. Birch*, 2 Q. B. 252. *Dwyer v. Collins*, 7 Exch. R. 639; though it appears that he obtained it from his client in the course of a communication with reference to the cause. *Bevan v. Waters*, Moo. & Mal. 235, Best, C. J. So a solicitor's clerk may be asked whether he has not received a particular paper from his client. *Eicke v. Nokes*, Moo. & Mal. 303, Lord Tenterden, C. J.; *Duffin v. Smith, Peake*, N. P. C. 108, by Lord Kenyon.



defeasance thereof, the plaintiff told his attorney in the suit, that he was glad it was settled, for that he had not given consideration for the note, and he knew it was a lottery transaction ; it was held, that the attorney was admissible to prove this conversation in an action to recover back the money. (x) The communication, said Lord Kenyon, was not made by the client in confidence as instructions for conducting his cause ; on the contrary, the purpose in view had been already obtained, and what was said was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit.

Where a prisoner being in custody on a charge of forgery wrote a letter to a person, desiring him to ask Mr. G. or any other solicitor, whether the punishment of forging a bill is the same where the name of the parties are entirely fictitious, as where the names are those of real persons ; it was held that this letter was not a privileged communication. (y)

Foster had charged Brown before a magistrate with embezzlement, and had produced his day-book and cash-book, which were examined both by Brown's counsel and the magistrate, and no entry of the sum alleged to have been embezzled was found in them. Brown was remanded on bail, and at that time he had a key of the counting-house in which the books were kept. When brought again before the magistrate the day-book was again produced, when there was found in it, in the handwriting of Brown, an entry of the sum in question ; and the charge was dismissed. Brown then brought an action against Foster for a malicious prosecution, and it was held that on the trial of that action, the counsel of Brown might be called to prove that the entry was not in the book on the first hearing before the magistrate ; for the counsel of Brown did not acquire his knowledge of the contents of the book from his client ; and he was only called upon to say what he himself saw upon the document, not what was communicated to him by his client. (z)

Where in an action against the managing director of a projected railway company, by a shareholder, to recover his deposits on the ground of fraudulent misrepresentations and failure of consideration, an attorney, who had been served with a subpoena *duces tecum* to produce the minute-book of the company, declined to produce it, on the ground that he had received it, after the company had ceased to exist, from a member of the provisional committee, for the purpose of defending him in an action brought against him as such ; it was held that he was not bound to produce it, although it was contended that the plaintiff was equally interested in the book with the person from whom the attorney received it. (a) It follows

If during a trial a document is produced by one party, the counsel or solicitor of the opposite party may afterwards prove the state in which the document then was.

If a document has been received confidentially, a person interested in it cannot compel its production.

(x) *Cobden v. Kendrick*, 4 T. R. 432.

(y) *Rex v. Brewer*, 6 C. & P. 363, Park, J. A. J.

(z) *Brown v. Foster*, 1 H. & N. 736.

(a) *Newton v. Chaplin*, 10 C. B. 356.

Wilde, C. J., after consulting Coltman, Maule, Cresswell, and Williams, Js. The question was argued before the court, but no express decision given on it. However, Maule, J., observed, 'A man has a document in his possession, the disclosure of which may utterly ruin him. For his

necessary defence in another action, he confides it to his attorney. Is it to be said that the attorney is bound to produce it, because some other person whom he, the attorney, does not represent, and has no connection with, has an interest in it ?' 'The privilege of the person who delivered the book to the attorney, as to the book, was the same in the hands of the attorney as if he had kept the book

The confidence does not cease by the solicitor becoming interested.

from this decision that, where an attorney holds a document for a client, he cannot be compelled to produce it by a person who has an equal interest in it with his client. So also confidential communications made by a party to his attorney or counsel do not cease to be privileged by the fact, that the attorney or counsel afterwards becomes interested as devisee of the property, to the title of which such communications related. (b)

A solicitor cannot use a confidential communication on his own behalf.

Where in an action on a promissory note it appeared that the plaintiff, being employed by the defendant as her attorney, had written to ask her for information in order to assist him in preparing a case for the opinion of counsel; it was held that he could not give in evidence an account of monies paid and received, which had been sent to him in consequence of his letter, for the purpose of taking the case out of the Statute of Limitations. (c)

Communications to obtain information as to facts.

The privilege is also confined to communications to the solicitor in his character of solicitor; and, therefore, a communication made to him, or question asked him by his client, not for the purpose of getting his *legal* advice, but to obtain information as to a matter of fact, is not privileged. As where a client asked his attorney whether he could safely attend a meeting of his creditors, called on the attorney's suggestions, and the attorney advised him to remain at his office for the present, and he accordingly remained there two hours to avoid being arrested; it was held that the attorney might prove all these facts, in order to show an act of bankruptcy, in an action by his client's assignees. (d)

Cross-examination of a solicitor.

If a solicitor or counsel be called by his own client to give evidence, he is not privileged from cross-examination on the same matter as to which he was examined in chief, although it were a confidential communication made professionally; but the cross-examination must not extend beyond that matter. (e)

Where a party is justified in refusing to produce a document, he cannot be compelled to prove its contents.

Where a party refuses to produce a document, and is justified in so doing, he cannot be compelled to disclose its contents; for it would be perfectly illusory for the law to say that a party was justified in not producing a deed, but that he was compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happened to know the contents of the document, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there might be in the deeds and titles of his estates. (f)

How the question may be raised and decided.

With respect to the mode of determining the question whether the communication be privileged or not, 'in general it is the solicitor who declines to give the evidence, on the ground of professional confidence. But it is competent for the client to take the objection, and call witnesses to prove the incompetency, and the judge is to determine the law arising from the facts.' (g) Where, therefore, it was proposed to put in a written account on the part of the plaintiff, it was held that the defendant was entitled to interpose,

(b) *Chant v. Brown*, 7 Hare, 79.

(c) *Cleave v. Jones*, 7 Exch. R. 421.

(d) *Bramwell v. Lucas*, 2 B. & C. 745.

See *Annesley v. Lord Angelsea*, 9 St. Tr. 391, before the Barons of the Exchequer in Ireland, 1748.

(e) *Vaillant v. Beaumont*, 2 A. & C. 622.

*R. v. Levison*, 11 Cox, C. C. 152.

(f) *Davies v. Waters*, 9 M. & W. 608.

Per Alderson, B. *Hibberd v. Knight*, 2

Exch. R. 11. *Marston v. Downes*, 6 C.

& P. 381. 1 A. & E. 31.

(g) Per Martin, B., *Cleave v. Jones*, 7

Exch. 421.

and put in evidence a letter of the plaintiff, and examine a witness to prove that the account was confidentially communicated by the defendant to the plaintiff as her attorney. (*h*)

There are, besides these professional communications, a number of cases of a particular description, in which, for reasons of public policy, information is not permitted to be disclosed. Courts of justice will not permit witnesses to be asked the names of those from whom they receive information as to frauds on the revenue. (*i*) And the rule of public policy which protects a witness from being asked such questions as would disclose the informer, if he be a third person, equally applies to questions which would disclose whether the witness is himself the informer. Therefore a witness for the Crown in a revenue prosecution cannot be asked in cross-examination, 'Did you give the information?' (*j*) In many trials for high treason, the same course has been adopted; and if parties were willing to disclose the sources of their information, they would not be suffered to do it by the judges. (*k*) 'If the name of an informer,' said Buller, J., in *Hardy's case*, 'were to be disclosed, no man would make a discovery, and public justice would be defeated.' And this privilege not only protects the actual informer himself, but those questions, which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Thus a person who has been employed to collect secret information for the executive government, (*l*) or for the service of the police, is not allowed to reveal the name of his employer, or the nature of the connection between them; (*m*) or the names of any persons to whom he has communicated his information for the purpose of its being transmitted, (*n*) whether those persons were magistrates, or concerned in the administration of government, or were merely the channel through which information was conveyed to government. (*o*)

Informers.

Agent of government or police.

In the *A.-G. v. Briant*, (*p*) Pollock, C. B., during the argument said, 'In ordinary prosecutions the name of the sovereign is used; but it may be used by any prosecutor; and probably the rule does not apply at all to such cases. But there may be reasons of state policy, whenever the government is directly concerned; and then the rule applies whatever be the offence. And where on an indictment for administering corrosive sublimate with intent to murder, it appeared that some communication had been made to the police, on which they searched a privy used only by the prisoner, and found in the soil a phial containing corrosive sublimate, and on the trial the policeman was asked from whom he had received the information, and he stated that all the police had received printed instructions,

The rule does not apply to ordinary prosecutions.

(*h*) *Cleave v. Jones*, *supra*, Erle, J., at the trial, and sanctioned by the court above; and per Rolfe, B., at the first trial of the same cause. Hereford Sum. Ass. 1849. MSS. C. S. G.

(*i*) By Dallas, C. J., in *Home v. Bentinck*, 2 Brod. & Bing. 162. *Hardy's case*, 24 How. St. Tr. 753. But where a person officiously interferes to inform any of the constituted authorities of alleged abuses, the communication is not privileged; and, if untrue, may be considered malicious and actionable. *Robinson v.*

*May*, 2 Smith, 3.

(*j*) *A.-G. v. Briant*, 15 M. & W. 169.

(*k*) 2 Brod. & Bing. 162.

(*l*) A shorthand writer sent to Ireland by the government. *Reg. v. O'Connell*, 1 Cox, C. C. 403.

(*m*) 24 How. St. Tr. 753. 1 Phill. Ev. 178.

(*n*) 24 How. St. Tr. 811.

(*o*) By Abbot, J., in *Rex v. Watson*, 2 Stark. 136. *Stone's case*, as cited by Lord Ellenborough, C. J., *ibid*.

(*p*) *Supra*.

one of which forbade them to name persons from whom any information was received ; and he therefore refused to say who were his informants unless ordered to do so by his superintendent. Cockburn, C. J., ordered him to answer the question, and he answered that he had it from two girls, who were not called for the prosecution. (q)

Official communications.

Upon the same ground the attorney-general of Upper Canada was not allowed to be asked as to the nature of a communication made by him to the governor of the province. (r) So the orders given by the governor of a foreign colony to a military officer under his command ought not to be produced. (s) So Abbott, C. J., refused to admit in evidence the report of a military court of inquiry, in an action of libel by an officer, respecting whose conduct the court had been appointed to inquire ; and his decision was confirmed on error in the Exchequer Chamber. (t) And Lord Ellenborough, C. J., would not permit the contents of a letter, written by an agent of government to Lord Liverpool, then secretary of state, or his lordship's answer, to be produced as evidence. (u) In *Watson's case*, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced by the defendant, was accurate. (v)

Questions contrary to state policy.

But a letter written by a private individual to a public officer (the chief secretary of the postmaster-general) complaining of the misconduct of a person under him, does not fall within the preceding cases. They were all cases of communication made by and between ministers and officers of government, and in the course of the discharge of a public duty by the person making the communication. (w)

Letter by a private person.

Who is to determine whether a document should be produced.

The question whether the production of a document would be injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the paper ; and if he attends and states that in his opinion the production of the document would be injurious to the public service, the judge ought not to compel the production of it. If indeed the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not as the judge may think proper, or sends a subordinate with the document with instructions to object, but nothing more, the case may be different. (x)

(q) *Reg. v. Richardson*, 3 F. & F. 693. Cockburn, C. J., pointed out that it was most material to the ends of justice that the persons should be named, as they could have stated how it was that they came to know that the bottle was where it was found, and perhaps could have given some clue as to the person who put it there.

(r) *Wyatt v. Gore*, Holt, N. P. C. 299, ruled by Gibbs, C. J. 1 Phill. Ev. 181.

(s) *Cooke v. Maxwell*, 2 Stark. N. P. C. 185.

(t) *Home v. Lord F. C. Bentinck*, 2 Brod. & Bing. 130.

(u) *Anderson v. Hamilton*, (n.), 2 Brod. & Bing. 156.

(v) 2 Stark. 145.

(w) *Blake v. Pilfold*, 1 M. & Rob. 198, Taunton, J.

(x) *Beatson v. Skene*, 5 H. & N. 838, 29 L. J. Ex. 430. Martin, B., *dissentiente*: he thought that whenever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel its production, notwithstanding the reluctance of the head of the department to produce it. In *Dickson v. the Earl of Wilton*, 1 F. & F. 419, where a clerk from the War Office was called to produce a letter written by a commanding officer of a regiment to his immediate superior, but submitted on behalf of the secretary of war whether it ought to be produced, Lord Campbell, C. J., held that it ought. See *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255.

In the *case of the Seven Bishops*, the clerk of the privy council was compelled to state what passed in the Council Chamber, and even what was said by the King himself, although the counsel for the Crown objected to it. (y) And the same evidence was allowed in *Lord Strafford's case*. (z) But in *Layer's case*, (a) it seems to have been considered that the minutes taken before the privy council were not to be divulged; and that the two other cases above cited were decided under the strong feelings which the circumstances of the times had produced; and the latter in particular has been considered as a very unwarrantable departure from law and justice. (b)

Transactions of  
privy council.

A clerk attending upon a grand jury shall not be compelled to reveal that which was given them in evidence; (c) and the jurors themselves are bound by oath not to disclose what passes before them; but it has been held that a grand jurymen may be called to prove who was the prosecutor of an indictment; for it is a question of fact, the disclosure of which does not infringe on his oath. (d) But where the grand jury returned a bill of indictment containing ten counts for forging and uttering the acceptance of a bill of exchange, with an indorsement, 'a true bill on both counts: ' Patten-son, J., would not allow one of the grand jury to be called as a witness, after the prisoner's trial had commenced, and after the grand jury had been discharged, to explain their finding. (e) And the Court of King's Bench have refused to receive an affidavit from a grand jurymen as to the number of grand jurors who concurred in finding a bill. (f)

Grand jury.

But where a gentleman of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury; and he immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed; and the witness was committed for perjury, to be tried upon the testimony of the gentleman of the grand jury. It was held that the object of this concealment was only to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of the persons against whom bills were found. This was a privilege which might be waived by the Crown. (g) And so where the prisoner was indicted for perjury in evidence given before the grand jury on a bill of indictment, a police constable, who was in the grand-jury room at the time the evidence was given, was called to prove the evidence of the prisoner, and it was urged that one of the

Evidence be-  
fore the grand  
jury.

(y) 4 St. Tr. 346.

(z) 1 St. Tr. 723.

(a) 6 St. Tr. 288.

(b) 1 Phill. Ev. 182.

(c) 12 Vin. Abr. Evidence B., a, 5.

(d) *Sykes v. Dunbar*, Selw. N. P. 1059,  
per Kenyon, C. J.

(e) *Reg. v. Cooke*, 8 C. & P. 582.

(f) *Rex v. Marsh*, 6 A. & E. 236.

(g) *Christian's Note*, 4 Bl. Com. 126.

There appears to be very little weight in the reason assigned for the concealment even before the Prisoner's Counsel Bill

passed, because the prisoner had in far the greater number of cases heard the evidence of the witnesses before the magistrate, and there is still less weight now, since the prisoner is entitled to copies of the depositions. And the oath itself seems not to apply to the facts proved before the grand jury; as far as regards this subject, it is 'the King's counsel, your fellows' and your own, you shall keep secret.' 4 Chitt. Cr. L. 183.

grand jury would not be allowed to give the evidence, and that if this witness were allowed to do so, it would be doing that indirectly which could not be done directly; Tindal, C. J., held that the evidence might be given, as it was for the purposes of public justice. (*h*)

A witness may be asked what he said before the grand jury.

In *Watson's case*, (*i*) a witness was questioned by the counsel for the prisoner as to his having produced and read a certain writing before the grand jury, and Lord Ellenborough, C. J., said, 'He had considerable doubt upon the subject; he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer.' But it has since been held that a witness for the prosecution in a case of felony may be asked on cross-examination whether he has not stated certain facts before the grand jury, and that the witness is bound to answer the question. (*j*)

House of Commons.

A witness was not allowed by Lord Ellenborough to be asked as to the expressions or arguments which a member of the House of Commons had made use of in the House; for, said his lordship, it would be a breach of duty in the witness (who was a member himself), and a breach of his oath, to reveal the councils of the nation; (*k*) but as to the fact of the plaintiff's having taken part in the debate, he was bound to answer. (*l*) So a member may prove who acted as speaker on a particular occasion. (*m*)

In 1818 the following resolutions were passed by the House of Commons: 'Resolved, *nemine contradicente*, that all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence. Resolved, *nemine contradicente*, that no clerk or officer of this House, or shorthand writer employed

(*h*) Reg. v. Hughes, 1 C. & K. 519. In 2 Rolle Abr. 77 (F.) 1, we find 'if a man empannelled and sworn on the Grand Inquest discover to strangers the evidence given to him and the rest of the jurors for the King, this is an offence punishable by fine and imprisonment on an indictment. Mich. 15, Ja. B. R. in *Smithe & Hill's case* admit. And the clerks of the Crown Office said that this is usual.' In 27 Ass. pl. 63, a grand jurymen was indicted as a felon for discovering what took place before the grand jury; but it was said that some justices held that this was treason: he was arraigned, however, for felony only, and acquitted: and a quære is added as to what the judgment would have been if he had been convicted. In the *Poulterers' case*, 9 Rep. 55 b, the judges heard the evidence given to the grand jury openly in court. In the *Earl of Shaftesbury's case*, 3 Harg. St. Tr. 417, on a bill of indictment for high treason the evidence was given in public before the grand jury, who doubted as to the legality of the proceeding; but *Pemberton, C. J.*, and *North, C. J.*, both declared that it had always been the practice to examine the witnesses publicly before the grand jury whenever it had been requested by those who prosecuted for the King. This practice seems

strongly to show that any person not a grand juror is competent to prove what he has heard a witness state before the grand jury; for it cannot be doubted that any of the public present in court when the grand jury heard the evidence openly might prove what he heard. *Shaftesbury's case* is said to have been the last instance of such a procedure. 4 Bl. Com. 302, Edit. Chr.

(*i*) 32 How. St. Tr. 107.

(*j*) Reg. v. Gibson, C. & Mars. 672, Parke, B. It has been held that when the grand jury have found a bill, the judges before whom the case comes on to be tried ought not to inquire whether the witnesses were properly sworn before they went before the grand jury, and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge merely. Reg. v. Russell, C. & Mars. 247. Gurney, B., and Wightman, J.; and Wightman, J., added, that Lord Denman, C. J., and himself had decided the same point the same way on the Northern Circuit.

(*k*) *Plunkett v. Cobbett*, 5 Esp. 137. 29 How. St. Tr. 71, 72.

(*l*) 5 Esp. 137.

(*m*) *Chubb v. Salomons*, 3 C. & K. 75. Pollock, C. B.

to take minutes of evidence before this House, or any committee thereof, do give evidence elsewhere in respect of any proceeding or examination had at the bar or before any committee of this House, without the special leave of the House.' (n)

Since these resolutions it has been held that a member of the House who acts as a teller on a division is not an officer of the House; and if a member be asked how another member voted on a particular occasion, he will not be compelled to answer if he decline doing so, and have not the leave of the House to give evidence. (o)

## SEC. II.

*How witnesses ought to be examined, and what Questions they may be Asked, and compelled to Answer.*

Before a witness is examined, he must be sworn in open Court. The proper method of administering the oath, and the objections which may be made previous to the administration of it, will be hereafter considered. (p) And the proper time and mode of objecting to the competency of a witness, whether on the *voir dire*, or at a later stage of the trial, will be discussed in the last section of this chapter. (q)

After a witness has been regularly sworn, the party who has called him proceeds to examine him in chief; respecting which examination the most important rule is, that leading questions must not be put to the witness; that is, questions which, being material to any of the points of the issue, plainly suggest to him the answer he is expected to make. But this objection is not allowed to be applied if the question is merely introductory, and one which, if answered by *Yes* or *No*, would not be conclusive on any of the points of the issue; for it is necessary to a certain extent to lead the mind of the witness to the subject of the inquiry. (r)

Thus in an action of assumpsit against two, in order to prove that the defendants were partners, the first witness was asked whether one of them had interfered in the business of the other. And upon this question being objected to as leading, Lord Ellenborough ruled that it might properly be asked. (s) An affirmative answer to this question would not have been conclusive, for the defendant might have interfered, without making himself a partner. So where the witness called to prove the partnership of the plaintiffs could not recollect the names of the component mem-

Examination  
in chief.

Leading  
questions.

What are not  
leading ques-  
tions.

(n) See 2 C. & K. 483. During the recess it has been the constant practice of the Speaker to grant such leave on the application of the parties to a suit. May's Law of Parl. 314.

(o) Chubb v. Salomons, 3 C. & K. 75. Pollock, C. B., after consulting the other Barons.

(p) Post, s. 7, p. 611.

(q) Post, s. 7, p. 611.

(r) Nicholls v. Dowding, 1 Stark. N. P. C. 81. A prisoner for felony was tried, but the jury were discharged,

owing to their being unable to agree. On being put on trial before a second jury, the judge, at the prisoner's request, instead of having the witnesses examined, simply called and swore them, and read over his notes, allowing liberty to examine and cross-examine each witness thereafter. Held, that this was an irregular practice whether the prisoner assented to it or not. R. v. Bertrand, 10 Cox, C. C. 619.

(s) See 10 C. & K. 100. P. C. 81.

Pointing out  
prisoners.

bers of the firm, so as to repeat them without suggestion, but said he might possibly recognise them, if suggested to him; Lord Ellenborough (alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names) ruled, that there was no objection to asking the witness whether certain specified persons were members of the firm. (*t*) Upon the trial of De Berenger and others, before Lord Ellenborough, at Guildhall, for a conspiracy, it became necessary for a witness (a post-boy, who had been employed to drive one of the actors in the fraud) to identify De Berenger with that person; and Lord Ellenborough held, that for this purpose the counsel for the prosecution might point out De Berenger to the witness, and ask him whether he was the person. (*u*) So in *Rex v. Watson*, (*v*) tried at bar, upon its becoming necessary to identify three of the prisoners, it was objected, that the attention of the witness was too directly pointed to them; but the Court held, that the counsel for the prosecution might ask in the most direct terms, whether any of the prisoners was the person meant and described by the witness. So where the plaintiff's son, being called as a witness for his father, was cross-examined as to the contents of a letter received by him from the plaintiff, which he swore had been lost, and mentioned some particular expressions as part of its contents; and witnesses were called on the part of the defendant to speak to the contents of the same letter; Lord Ellenborough ruled that the defendant's counsel might ask one of them, who had first exhausted his memory by stating all he recollected of the letter, whether it contained the particular expressions sworn to by the plaintiff's son; for otherwise, said his lordship, it would be impossible ever to come to a direct contradiction. (*w*)

Leading in  
chief to con-  
tradict former  
witness of ad-  
verse party.

When, upon cross-examination, a witness has denied having used particular expressions, or having made a particular statement to A. B., who is afterwards called on the part of the adverse party, for the purpose of contradicting the first witness, by proving that he actually did speak the words, or make the statement to him, it is very usual in practice for the counsel of the adverse party, in examining A. B. in chief as his own witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or made such and such a statement. And accordingly, where a witness of the plaintiff's, in cross-examination, had been asked as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and he had denied having used them; Abbott, C. J., held, that the defendant's counsel, having called a person to prove that the former witness had used such expressions, was entitled to read to his own witness the particular words from his brief. (*x*) However, a very able writer (*y*) has with great force endeavoured to show, that leading questions under such circumstances are irregular.

Where not  
allowable.

But this rule does not apply to conversations which are evidence

(*t*) *Acerro v. Petroni*, 1 Stark. N. P. C. 100.

(*u*) 1 Stark. Ev. p. 167.

(*v*) Stark. N. P. C. 128.

(*w*) *Courteen v. Touse*, 1 Campb. 43.

(*x*) *Edmonds*

N. P. C. 7.

(*y*) 2 Phill. Ev. 404, 405. The practice, however, is perfectly well settled as stated in the text. C. S. G., and see 1 Stark. Ev. 169, 170.



themselves. A witness who was present at the time of the apprehension of the plaintiff by the defendant, was asked whether he had not used certain expressions in a conversation which then took place between the plaintiff and defendant, which he denied; and Erskine, J., held that a person who was called to prove that the witness had said what he had denied could not be examined by the counsel reading from his brief the very words which the witness had so denied having used, but that the examination must proceed in the usual way by asking what had passed. (z) Where one witness has given an account of what a prisoner has said on a particular occasion, and another is called for the prisoner to give a different account, the proper course is to call upon him to give his version of the matter; and when he has done so, then to ask him whether this or that expression has been used; for this is not like the case of a proposed contradiction, where a witness has denied that certain specific words were used. (a)

If a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the Court may deem it right to relax the rule against leading questions, and allow the examination in chief to assume something of the form of a cross-examination. It is entirely in the discretion of the judge to determine how far he will allow the examination in chief to be by leading questions. (b) And where an issue had been directed by the Court of Chancery, with power to examine the parties, Best, C. J., held that the defendant stood in a situation which of necessity made him adverse to the plaintiff, by whom he was called, and that the counsel for the plaintiff might, as a matter of right, cross-examine him. (c) But in general, the fact of a witness being an unwilling or adverse witness is to be ascertained by the nature of his evidence, his manner of answering, and demeanour, before the unrestricted power of leading can be given; it is not enough, for instance, in a prosecution, that the witness is intimate with the prisoner, or that he has been informed against by the prosecutor, to justify the counsel in beginning at once with the cross-examination. (d)

Leading an adverse witness.

After the examination in chief is closed, the other party is at liberty to proceed to cross-examination, without regard generally to the rule restricting examinations in chief in respect to leading questions.

Cross-examination.

(z) *Hallett v. Cousens*, 2 M. & Rob. 238.

(a) *Reg. v. Fussell*, 3 Cox, C. C. 291. Wilde, C. J., Maule, J., and Parke, B.

(b) 2 Phill. Ev. 403. In *Bastin v. Carew, R. & M. N. P. R.* 127, Abbott, C. J., allowed the cross-examination of an adverse witness, and said, 'I mean to decide this, and no further—that in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice.' *Reg. v. Chapman*, 8 C. & P. 558, Lord Abinger, C. B. *Reg. v. Murphy*, 8 C. & P. 297, Coleridge, J.

(c) *Clarke v. Saffery, R. & M. N. P. R.* 126.

(d) 2 Phill. Ev. 404, citing *Reg. v. Ball*, 8 C. & P. 745, where a witness called on the part of the prosecution

contradicted the prosecutor as to the fact of the prisoner having been at her house on the night when the offence was committed, and it appeared that she was intimately acquainted with the prisoner, and that the prosecutor had informed against her for keeping her beerhouse open at improper hours; and on its being submitted that these facts raised such an inference of hostility towards the prosecutor, and of bias in favour of the prisoner, as to entitle the counsel for the prosecution to cross-examine her; Erskine, J., said, 'I think that the situation in which this witness stands towards either party, does not give the party calling the witness a right to cross-examine her, unless her evidence was of itself of such a nature as to make it appear that she was an adverse witness.'

Leading questions in cross-examination.

If the witness betrays a zeal against the cross-examining party, or shows an unwillingness to speak fairly and impartially, he cannot, it should seem, be led too much. (e) But where the witness on the other hand discovers an anxiety to serve the cross-examining party, although the courts do not usually exclude the counsel, on cross-examination, from putting leading questions, it is obvious that evidence so obtained is very unsatisfactory, and is open to much observation. (f) And although the witness may be led on cross-examination to bring him directly to the point as to the answer, yet if he has betrayed an inclination to lean, and be favourable to the cross-examining party, it is not allowable to go the length of putting into the witness's mouth the very words which he is to echo back. (g) But the practice has generally been to put leading questions in cross-examination to a witness, whether willing or adverse; and where a counsel was putting leading questions in the usual way to a witness who appeared favourable to the side of the counsel who was cross-examining him, and this was objected to; Alderson, B., said, 'I apprehend that you may put a leading question to an unwilling witness on the examination in chief at the discretion of the judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not.' (h)

What may be asked on cross-examination.

A witness cannot be asked, upon cross-examination, except for the purpose of impeaching his credit, questions which are not in any way relevant to the matters in issue; (i) the subject of cross-examining for the purpose of impeaching his credit will perhaps be more conveniently discussed in a subsequent section, (j) in which place (k) will also be considered the obligation of a witness to answer questions tending to subject him to a criminal prosecution, or degrading to his character. It is, however, proper to mention in this place how far a witness is compellable to answer a question, whereby he may subject himself to a civil action, or charge himself with a debt. Considerable doubts had been entertained upon this subject, before the 46 Geo. 3, c. 37; for the settlement of which it was thereby declared and enacted, that a witness cannot by law refuse to answer any question relevant to the matter in issue (the answering of which has no *tendency* to expose him to a penalty or forfeiture of any nature whatsoever) by reason only, and on the sole ground that the answering such questions may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or any other persons. (l) It seems a witness is still privileged from an-

(e) 2 Phill. Ev. 406.

(f) Mr. Starkie, in his Treatise on Evidence, vol. 1, p. 197, mentions that he has heard Lord Tenterden express himself to this effect more than once.

(g) By Buller, J., in Hardy's case, 24 How. St. Tr. 755, referring to a rule laid down on the day before by Eyre, C. J., to the same effect.

(h) Parkin v. Moon, 7 C. & P. 408.

(i) A cross-examination as to a fact otherwise irrelevant, is not warranted by the circumstance that the adverse counsel opened it, without any attempt at proof. Lucas v. Novosilieski, 1 Esp. N. P. C. 296.

(j) Sec. 3.

(k) Post, p. 575.

(l) See R. v. Woburn, 10 East, 395. 2 Phill. Ev. 420. There is a distinction between the obligation of a witness, since this statute, to answer questions, though they may subject him to civil suits; and his obligation to produce writings, &c., under a *subpoena duces tecum*. For if a *subpoena duces tecum* is served, the party must bring his deeds into court in obedience to the subpoena, although, if he states that they are his title deeds, no judge will ever compel him to produce them. Pickering v. Noyes, 1 B. & C.

swering any question, the answer to which might subject him to a forfeiture of his estate. (*m*)

Counsel upon cross-examination cannot assume that the witness has made an assertion in his examination in chief, which was not in fact made, (*n*) or put a question which assumes a fact not in proof. (*o*)

Assumptions not allowable in cross-examination.

It is not allowable upon cross-examination to ask a witness, except with respect to previous statements in writing made by him, as to the contents of written instruments, (*p*) although they are shown to be in the possession of the opposite party, and notice has been given to the opposite party to produce them. (*q*) Under what circumstances a cross-examination as to the contents of a written document, for the purpose of impeaching the credit of a witness, is allowable, will be considered hereafter in the third section of this chapter. (*r*)

Cross-examination as to written instruments.

Upon the trial of Kroehl, Gibson, and Koech, (*s*) for a conspiracy, where the three defendants defended separately, Koech alone called witnesses, and examined to a conversation between himself and Kroehl. The counsel for the prosecution was proceeding to cross-examine as to another conversation between Koech and Kroehl, when the counsel for the prisoner Kroehl objected, on the ground, that the effect might be to bring out a new case against Kroehl, although he had called no witnesses, and after the case for the Crown was finished; but Abbott, J., said, that as Koech had called witnesses, he could not prevent the cross-examination as to any conversations that might affect Koech. It might be a matter for future consideration whether the counsel for Kroehl, after such evidence, would have a right to address the jury upon it.

Cross-examination of witness called by one of several defendants alone.

Woods and May were indicted for manslaughter, and separately defended; the counsel for Woods addressed the jury, but called no witness, and then the counsel for May addressed the jury and called witnesses, who threw the blame on Woods; and it was held that the counsel for Woods should be allowed not only to cross-examine May's witnesses, but again to address the jury. The proper course was for Woods' counsel to cross-examine first the counsel for the prosecution next, and the counsel for May to re-examine. At the close of the evidence, Woods' counsel would address the jury, confining himself strictly to the evidence adduced for May, and then the counsel for the prosecution would reply generally. (*t*) So where Burdett and Luck were tried for stealing wood, and in the course of the defence of Luck, Cox was called as a witness on his behalf, with a view of showing that Luck was an innocent agent in taking the wood, and in so doing Cox

Where one prisoner calls witnesses who incriminate another prisoner, the latter is entitled to cross-examine such witnesses, and to address the jury again on their evidence.

(*m*) 1 Phill. Ev. 264. *May v. Hawkins*, 24 L. J. Ex. 309; 11 Ex. 210. *Chester v. Wortley*, 25 L. J. C. P. 117.

(*n*) *Hill v. Coombe*, *cor.* Abbott, J., *Manning's Digest*, tit. *Witness*, pl. 236.

(*o*) *Doe v. Wood*, *cor.* Abbott, J., *ibid.* pl. 237. The objection was frequently taken and allowed during the proceedings in the House of Lords in the Queen's case. See the printed evidence.

(*p*) *Sainthill v. Bound*, 4 Esp. 74. *Howell v. Lock*, 2 Campb. 14. See *ibid.* p. 581.

(*q*) *Graham v. Dyster*, 2 Stark. N. P. C. 23. *Sideways v. Dyson*, *ibid.* 49. A witness may be asked as to the contents of a written document, if the party examining is in a position to give secondary evidence of its contents.

(*r*) *Post*, p. 580.

(*s*) 2 Stark. N. P. C. 343.

(*t*) *Reg. v. Woods*, 6 Cox, C. C. 224. The Recorder, after consulting Cresswell, J., and Williams, J. See *R. v. Copley*,

gave evidence tending to criminate Burdett; Burdett's counsel claimed the right of cross-examining Cox, and then addressing the jury upon his evidence; but the sessions refused permission to cross-examine and address the jury, but offered to put through the chairman such questions as Burdett's counsel suggested; it was held, on a case reserved, that, in this particular case, the counsel for Burdett had a right to cross-examine Cox, and to cross-examine him without doing so through the Court, and had also a right to reply on his evidence. But the Court must not be understood as saying that he would have had that right if the evidence of Cox had not tended to criminate him. All the Court decided was, that in this particular case the course taken was wrong. (*v*)

Who may be cross-examined.

If a witness be called merely for the purpose of producing a written instrument, he need not be sworn, and, unless sworn, he is not subject to cross-examination. (*v*) If a witness be called, though it be through necessity, for the purpose of the mere formal proof of a document, this makes him a witness for all purposes, and he may be cross-examined as to the whole of the case. (*w*) If a witness be called under a mistake, and the mistake be discovered before any question is put to him by the counsel who calls him, he is not liable to cross-examination, although he has been sworn. (*x*) Where a witness being sworn was asked only one immaterial question, and his evidence stopped by the judge, it was held that the opposite party had no right to cross-examine him. (*y*)

Calling witnesses whose names are on the back of the indictment.

It is fully settled that the counsel for the prosecution are not bound to call every witness whose name is on the back of the indictment, (*z*) but may call what witnesses they think proper. (*a*) The prosecutor, however, ought to cause the witnesses to be present in court, because the prisoner may have neglected to bring them himself in consequence of their names being on the back of the bill. (*b*) It was formerly the practice, where the counsel for the prosecution did not call a witness whose name was on the back of the bill, for the judge to call the witness, in order that he might be cross-examined by the prisoner in the same way as if he had been called by the counsel for the prosecution; (*c*) but it is now

(*u*) *Reg. v. Burdett*, Dears. C. C. 431. See *Beale v. Moulis*, 1 C. & K. 1. On the same ground it would seem that one prisoner might call witnesses to contradict the witnesses called for another prisoner, if their evidence criminated him.

(*v*) *Simpson v. Smith*, 2 Phill. Ev. 397. See also *Davis v. Dale*, M. & M. 514. *Evans v. Moseley*, 2 Dowl. P. R. 364. *Perry v. Gibson*, 1 A. & E. 48. *Summers v. Moseley*, 4 Tyrw. 158. *Rex v. Murlis*, M. & Mal. 515.

(*w*) *Morgan v. Brydges*, 2 Stark. N. P. C. 314. But see *Phillipps v. Eamer*, 1 Esp. 356. See *Reed v. James*, 1 Stark. N. P. C. 132.

(*x*) *Wood v. Mackinson*, 2 M. & Rob. 273. *Rush v. Smyth*, 4 Tyrw. 675. 1 C. M. & R. 94. *Clifford v. Hunter*, 3 C. & P. 16. *Rex v. Brooke*, 2 Stark. N. P. C. 472.

(*y*) *Creedy v. Carr*, 7 C. & P. 64. *Gurney*, B.

(*z*) *Reg. v. Woodhead*, 2 C. & K. 520, Dec. 1847, where Alderson, B., said, the judges had laid down this as a rule. *Reg. v. Edwards*, 3 Cox, C. C. 82. *Erle*, J. A.D. 1848. *Reg. v. Cassidy*, 1 F. & F. 79, March 1858. *Parke*, B., after consulting Cresswell, J.

(*a*) *Reg. v. Cassidy*, *supra*. *Reg. v. Edwards*, *supra*.

(*b*) *Reg. v. Woodhead*, *supra*. *Reg. v. Cassidy*, *supra*.

(*c*) *Rex v. Simmonds*, 1 C. & P. 84. *Hullock*, B. *Rex v. Whitbread*, *ibid.* note (*a*). *Reg. v. Bull*, 9 C. & P. 22. In *Rex v. Beezley*, 4 C. & P. 220, Little-dale said that the counsel for the prosecution ought to call all the witnesses on the back of the bill; and in many cases on the Oxford Circuit learned judges have directed the counsel for the prosecution to call every witness on the back of the bill, and it has been treated as if the counsel for the prisoner had a right to have them all called by the counsel for

settled that where a witness who is not called by the counsel for the prosecution is called by the prisoner, he must be considered his witness, as much as those subpoenaed and called by him. (d) As the witness is the prisoner's witness, it follows that the counsel for the Crown may impeach his evidence in the same manner as if he had been subpoenaed and called by the prisoner. (e)

A witness whose evidence is relevant, may be called by the prosecution, although he has not been before the magistrates, and although his name and the substance of his evidence has not been given to the prisoner or his attorney. (f)

## Calling a witness not before the magistrate

the Crown, in order to enable him to cross-examine them. Indeed, the cases have gone further than this; as it has been held on several occasions that witnesses, not on the back of the bill, but who were acquainted with the facts of the case, ought to be called on the part of the prosecution. In *Reg. v. Holden*, 8 C. & P. 606, on an indictment for murder, Patteson, J., directed the daughter of the deceased, whose name was not on the back of the indictment, to be called saying, 'every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter.' And in the same case, it appearing that there had been a *post mortem* examination of the body of the deceased by a surgeon who was examined, and another surgeon who was in court, and that there was some difference of opinion as to the cause of the death; Patteson, J., said, 'As the surgeon is in court, I shall insist upon his being examined. He is a material witness, who is not called on the part of the prosecution; and as he is in court, I shall call him for the furtherance of justice.' And he was called and examined by the learned judge. In *Reg. v. Chapman*, 8 C. & P. 558, Lord Abinger, C. B., directed the name of the brother of the prisoner, who was present at the time when the murder was alleged to have been committed, to remain on the back of the bill, and said, the counsel for the prosecution would best discharge his duty by calling him as a witness on the trial. See also *Reg. v. Orchard*, *ibid.* note (b). In *Rex v. Stroner*, 1 C. & K. 650, March 1845, the prosecutrix, on a trial for rape, stated that she immediately complained to her mistress, and that her clothes were afterwards washed by a woman, and neither of these persons were bound over to give evidence, and their names were not on the back of the indictment; but both were attending as witnesses for the prisoner; and Pollock, C. B., held that they must be both called for the prosecution, but that the counsel for the prosecution must be allowed every latitude in examining them. In *Rex v. Bodle*, 6 C. & P. 186, Gaselee, J., and Vaughan, B., held that it was in

the discretion of the judge whether a witness whose name is on the back of the indictment should be called for the prisoner's counsel to examine him before the prisoner was called on for his defence ; and the father of the prisoner having been examined before the coroner, and bound over to give evidence at the assizes against the prisoner for murder, the learned judges held that the father ought to be called ; and he was called, and asked as to statements he had made respecting the murder, with a view of discrediting and contradicting him, and thereby raising a suspicion that the witness might have committed the murder himself ; and it was held that as the father had not been examined by the counsel for the prosecution, and had been only called at the instance of the counsel for the prisoner, the latter could not be allowed to call witness to contradict him as to the different accounts he had given respecting the murder. In *Reg. v. Vincent*, 9 C. & P. 91, Alderson, B., held that the calling such a witness in felony was discretionary, but it was a discretion always exercised, and he thought it might well be exercised in a case of misdemeanor. C. S. G.

(d) *Reg. v. Cassidy, supra.* *Reg. v. Woodhead, supra.* The following cases, therefore, cannot be considered authorities any longer. *Reg. v. Barley*, 2 Cox, 191, where Pollock, C. B., after consulting Coleridge, J., insisted on the counsel for the Crown calling witnesses on the back of the bill. The dictum of Alderson, B., that it was the duty of the prosecutor to put an adverse witness in the box, in *Reg. v. Carpenter*, 1 Cox, C. C. 72. *Rex v. Beezley*, 4 C. & P. 220, where Littledale, J., held that the counsel for the Crown was confined to questions which arose out of the cross-examination of a witness whom he had directed to be called. *Rex v. Harris*, 7 C. & P. 581, as far as it may tend to show that where the witness is called by the judge, the counsel for the Crown has no right to examine him.

(e) Reg. v. Woodhead, *supra*, per Alderson, B.

(f) R. v. Greenslade, 11 Cox, C. C. 412. Reg. v. Pietro Stiginani (10 Cox, Crim. Div.) *griffed*.

Witness of one party afterwards called by the other.

It is reported to have been ruled by Lord Kenyon, (*g*) that where a witness has been examined by one party, and cross-examined by the other, and the latter has afterwards occasion to call the same witness back as part of his own case, the privilege of cross-examination continues, and leading questions may be put to him. But it has been very properly remarked, (*h*) that the mode of examination under such circumstances is in truth regulated, according to the disposition and temper manifested by the witness, by the discretion of the presiding judge. (*i*)

Witness recalled by the judge.

Where on an indictment for burglary, there was no counsel for the Crown, Taunton, J., after the examination of witnesses to facts on the part of the prisoners, recalled a witness for the prosecution, and then, addressing the prisoner's counsel, inquired if he had any question to ask upon it, saying, that, although he as judge had recalled the witness for the purposes of justice, he thought it right that the prisoner's counsel should have the opportunity of cross-examining the witness again. (*k*)

Re-examination.

The object of re-examining a witness being merely to explain the facts stated by the witness on cross-examination, he cannot be re-examined as to any facts unconnected with it; but if any material question has been omitted in the examination in chief, the practice is to suggest it to the Court, who will put it to the witness, or decline to do so, at its discretion. (*l*)

Evidence in reply must be confined to the contradiction of the evidence for the defence.

After the close of the case for the defendant, the general rule is, that the evidence in reply must bear directly or indirectly upon the subject matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. (*m*) This is the general rule, made for the purpose of preventing confusion, embarrassment, and waste of time; but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted, as he may think best for the discovery of truth and the administration of justice. (*n*)

Where on an indictment for larceny, the case for the Crown rested merely on the fact of the stolen property being found in the house of the prisoner soon after it was lost, and a witness for the defence proved that the prisoner bought the property from a third person, who was called by the counsel for the Crown to prove not only that the prisoner did not buy the property of him, but that he saw the prisoner steal it; it was held that his evidence was only admissible as far as it went to destroy the case set up on the part of the prisoner, that is, to show that the prisoner did not buy the property of him. (*o*) So where the defence of the prisoners was an *alibi*, viz., that they were at a public-house, a considerable distance from where the offence was committed, and it was proposed on the part of the Crown to prove in reply that the prisoners were seen near the spot at which the robbery was committed, and

(*g*) Dickinson v. Shee, 4 Esp. 67.

(*h*) 1 Stark. Ev. 188.

(*i*) See also the observations of Abbott, C. J., in Basten v. Carew, Ry. & Mood. N. P. C. 127.

(*k*) Rex v. Watson, 6 C. & P. 653.

(*l*) 2 Phill. Ev. 408. See post, p. 590, as to re-examining a witness who has been cross-examined by the prisoner.

statements and declarations.

(*m*) 2 Phill. Ev. 408.

(*n*) Ibid.

(*o*) Rex v. Stimpson, 2 C. & P. 415, Garrow, B. Mr. Philipps observes, 'This was carrying the rule very far, as the fact of seeing the prisoner steal the goods would be strong evidence that he did not buy them.' 2 Phill. Ev. 410.

that, therefore, they could not have been in the public-house; Taunton, J., rejected the evidence, saying, 'Proving that the parties were near the place at which the offence was committed is evidence in chief, and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence which can be given as evidence in reply, is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution.' (p) But where on a similar indictment a similar defence was set up, Alderson, B., permitted a person who had been robbed on the road near the place where the prosecutor was robbed, to prove not only that he saw the prisoner there, but the whole circumstances under which he met the prisoner. (q) And so where in an action for an injury occasioned by the defendant through negligently driving a carriage, the plaintiff's witnesses described the carriage as having been driven by the defendant when the accident occurred at Layton, and other witnesses spoke to the defendant having been seen in the neighbourhood of Layton about the time in question; and the defendant called witnesses to prove that, at the time in question, he was at Richmond, and the plaintiff then tendered other witnesses to show that the defendant was not at Richmond, but at Layton; Lord Denman, C. J., held that it would perhaps have been more correct had the plaintiff, in the first instance, called the witnesses then tendered, but he did not think that he could, even at this period of the cause, exclude the evidence from the jury, which certainly went to contradict the defendant's *alibi*. (r) And where on an indictment for horse stealing the defence was an *alibi*, which went to show that the prisoner, on the 7th and 8th of March, was at places many miles from the place where the horses were stolen, and on the 9th returned home; Tindal, C. J., permitted a witness to be called to prove that the prisoner, when taken into custody on the 10th of March, said that he had been at home ever since the Wednesday before. (s)

Where on a trial for robbery the prosecutor proved that he had lost a large quantity of blood from his head, and that his assailant had put his arm round his neck, and the prisoner's coat appeared to have been recently stained with blood on the collar and sleeve; and the prisoner called a witness, who swore that on the day before the robbery he had observed that the prisoner's coat was bloody, and that the prisoner had told him the blood had flowed from a hare which he had carried over his shoulder; it was held that the statement of the prisoner before the magistrate, in which he had given a different account of the marks of blood, was admissible in reply to the evidence given by the prisoner. (t)

A statement of the prisoner in reply to the prisoner's witness.

(p) *Rex v. Hilditch*, 5 C. & P. 299.

(q) *Reg. v. Briggs*, 2 M. & Rob. 199. *Rex v. Hilditch* does not appear to have been cited in this case. It may have been thought in this case that the evidence of the second robbery was not essential on the part of the prosecution until the *alibi* was set up, and that that rendered the proof of the second robbery essential. See the cases collected *ante*,

p. 370, *et seq.* C. S. G.

(r) *Briggs v. Aynsworth*, 2 M. & Rob. 168. See a learned note to this case by the reporters. And see *Reg. v. Frost*, 9 C. & P. 159.

(s) *Rex v. Findon*, 6 C. & P. 132.

(t) *Reg. v. White*, 2 Cox, C. C. 192. Pollock, C. B., after consulting Coleridge, J.

Evidence in reply, where linseed was mixed with chaff.

Where the plaintiff brought an action against the defendant for imprisoning her on a false charge of stealing chaff, which was found in her drawer, and two witnesses called by the plaintiff stated that they had sold her chaff similar to that found in her drawer, and the defendant's witnesses pointed out marks showing that the chaff found in the plaintiff's drawer corresponded with that belonging to the defendant, and mentioned in particular that linseed was mixed with the chaff, which was said to be unusual; it was held that the plaintiff might prove in reply that linseed mixed with chaff had been previously sent to the plaintiff. (*u*)

Reply commenced before putting in evidence.

Where the counsel for the Crown has, *per incuriam*, omitted to put in a piece of evidence before commencing his reply, and the course of justice might be interfered with if the evidence were not given, the Court may permit the evidence to be given. (*v*)

It is in the discretion of the Court to admit evidence in reply.

The question whether any particular evidence ought to be admitted in reply, rests in the discretion of the Court, which will be exercised with a view to attain the ends of justice according to the circumstances of the case. (*w*)

Examination of witnesses generally, with reference to written documents.

It has already been remarked that a witness, except with respect to previous statements in writing made by him, cannot be cross-examined as to a written document in the possession of the party who calls him; (*x*) and the rule is general, that a witness cannot either be examined in chief or cross-examined as to the contents of a written document, not produced, unless the party examining or cross-examining is in a position to give secondary evidence of its contents. (*y*)

Written instruments used to refresh the memory.

Where, in order to prove the taking of a tenement, a witness produced a book containing an entry made by him of the terms of the taking, and stated that he had no memory of them but from the book, without which he should not of his own knowledge be able to speak to the facts, but on reading the entry he had no doubt that the facts really happened; the Court held that the witness might look at the entry to refresh his memory, and give parol evidence of the letting. (*z*) So where a receipt for money has been given on unstamped paper, it may be used by the witness, who saw it given, to refresh his memory. (*a*) And where a witness, who had received money and given a receipt for it, which could not be read in evidence for want of a proper stamp, had become blind, the receipt was allowed by Abbott, C. J., to be read over to him in court (he being informed that the paper was in his handwriting) in order to refresh his memory. (*b*) So to prove an act of bankruptcy committed some years back, a deposition made at the time by an aged witness was allowed by Lord Kenyon to be read to him for the same purpose. (*c*) And where a witness was uncertain whether an execution was put in on the 4th or 5th of May, Tindal, C. J., on the authority of the preceding case, allowed his

(*u*) Wright v. Willcox, 9 C. B. 650.

(*v*) Reg. v. White, 2 Cox, C. C. 192. See this case, *ante*, p. 510.

(*w*) Doe dem Nicoll v. Bower, 16 Q. B. 805.

Wright v. Willcox, 9 C. B. 650.

(*x*) *Ante*, p. 561.

(*y*) See Meyer v. Sefton, 2 Stark. N. 460.

P. C. 276. Roberts v. London & Lancashire Ry. Co., 11 Q. B. 440.

(*z*) Rex v. St. Martin's, Leicester, 2 A. & E. 210. The entry was made at the time of the taking.

(*a*) Rambert v. Cohen, 4 Esp. 213.

(*b*) Catt v. Howard, 3 Stark. N. P. C. 3.

See also Jacob v. Lindsay, 1 East,

Vaughan v. Martin, 1 Esp. N. P. C. 440.



deposition, which had been made before the Commissioners of Bankruptcy on the 12th of the same month, to be used by the witness, to refresh his memory as to the date of the execution. (*d*)

So where a deed bore date the 20th of June, and a witness could not recollect whether it was executed on the day of the date or not; Pollock, C. B., held that his examination taken on the 3rd of July, whilst the facts stated in it were fresh in his memory, and which was not in his handwriting, but was signed by him, might be used to refresh his memory. (*e*) But a witness cannot refresh his memory by such depositions, if they are not taken contemporaneously, or nearly so, with the matters to which they relate. (*f*)

With regard to depositions in criminal cases, it has been held that they are not available for the purpose of refreshing the memory of a witness, (*g*) unless they are used for that purpose with the sanction of the court. (*h*)

Depositions in criminal cases.

The general rule is, that a witness, to assist his memory, may use a written entry, if it were made by himself shortly after the occurrence of the facts to which it relates; but if he cannot speak to the fact from recollection, any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to nothing. (*i*) Although in general the entries ought to have been made by the witness himself, yet if another wrote them, and the witness regularly examined them from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection, he may refresh his memory by referring to them, as if he had written them with his own hand. (*j*) Where, therefore, a witness had attended Chartist meetings for the purpose of obtaining information and communicating it to the government, and within two hours after each meeting he detailed such information to an inspector, who took it down from his dictation, and some of the accounts were read over to him and some he read over himself, and he often saw what the inspector wrote, but did not see all, and he signed all the papers; and the inspector proved that he took down what the witness said as nearly as possible, and read the whole over to the witness; it was held that the witness might refresh his

Rule as to memorandum to refresh the memory.

(*d*) *Smith v. Morgan*, 2 M. & Rob. 257. But Tindal, C. J., refused to allow the witness to look at more than the date of the transaction, as to which he was uncertain; as it would be leading a witness too much to attempt to bind him down to all that he had thus said.

(*e*) *Wood v. Cooper*, 1 C. & K. 645.

(*f*) *Whitfield v. Aland*, 2 C. & K. 1015, *Wilde*, C. J. No date is given in this case.

(*g*) *Reg. v. Stokes*, 4 Cox, C. C. 451, *Williams*, J., saying, 'The deposition is not contemporaneous with the facts deposited to, and does not fall within the description of memoranda and entries available for the purpose of refreshing a witness's memory.' In this case it was the counsel for the prisoner who proposed so to use the depositions. In *Reg. v. Palmer*, 5 Cox, C. C. 236, *Pollock*, C. B., said, 'A deposition is not the wit-

ness's own memorandum, made by him contemporaneously with the occurrence of the facts stated there, but a narrative taken down by somebody else from a statement subsequently made by him, and, therefore, although very good evidence for the purpose of contradicting him, it differs from the principle of the cases that relate to refreshing the memory.'

(*h*) *Reg. v. Williams*, 6 Cox, C. C. 343, and other cases, *ante*, p. 526.

(*i*) *Doe v. Perkins*, 3 T. R. 749, *Beech v. Jones* 5 C. B. 696. S. P. on the authority of *Doe v. Perkins*. See *Henry v. Lee*, 2 Chit. Rep. 124.

(*j*) *Burrough v. Martin*, 2 Campb. 112. The entries were in a log-book. See 2 Phill. Ev. 413, *Duchess of Kingston's case*, 20 How. Sta. Tr. 619. *Lawes v. Reed*, 2 Lew. 152. *Reg. v. Phillpotts*, 5 Cox, C. C. 325. *Reg. v. Bird*, 5 Cox, C. C. 11.

memory by these papers. If he could say that when his mind was so full of the circumstances, he ascertained that the paper correctly detailed them, it was immaterial whether he ascertained it by looking at the paper himself or by hearing it read over correctly by another person. (*k*) So where a captain produced the ship's log, which was written by the mate, who was absent, but he had himself read the log about a week after it was written, when the matters contained in it were fresh in his mind, and he then thought it correct, it was held that he might refresh his memory by it. (*l*) So where an editor of a paper proved that an article on the weather had been furnished by a gentleman, who was in the habit of writing such articles for that paper, and that the manuscript could not be found, and the writer stated that he had no recollection of having furnished the particular article, but that the statements contained in the articles he had furnished were invariably true; it was held that the article might be used for the purpose of refreshing his memory. (*m*) But where the witness neither recollects the fact, nor the truth of the account in writing, and the writing was not made by him, his testimony, so far as it is founded on the written paper, would be objectionable as hearsay; the witness can be no more permitted to give evidence of his inference from what a third person has written, than from what a third person has said. (*n*)

By a copy of  
a paper.

It has been held that a witness will not be allowed to refresh his memory with a copy of a paper, though the copy was made by himself, and though the writing might have been used for the purpose. Thus it has been held that a witness cannot refresh his memory by a copy of an original memorandum, made by him six months after he wrote the original, although the original was so covered with figures as to be illegible. (*o*) But it is said that in analogy to the ordinary rules of documentary evidence, a copy may be used to refresh the memory, on proof that the original is lost. (*p*) And two cases are reported where it is said to have been held that a witness might refresh his memory by a copy. (*q*) And where a memorandum was made by a witness at the time on a rough piece of paper, and he copied it out more neatly, it was held that he might refresh his memory by the copy. (*r*) And where a clerk to a tradesman entered the transactions in trade as they occurred into a waste-

(*k*) Reg. v. Mullins, 3 Cox, C. C. 526. Maule, J., and Wightman, J.

(*l*) Anderson v. Whalley, 3 C. & K. 54. Talfourd, J. See Reg. v. Stokes, 4 Cox, C. C. 451.

(*m*) Topham v. M'Gregor, 1 C. & K. 320. Rolfe, B.

(*n*) 2 Phill. Ev. 413.

(*o*) Jones v. Stroud, 2 C. & P. 196, Best, C. J.

(*p*) 1 Stark. Ev. 179, and see 2 Phill. Ev. 416.

(*q*) Tanner v. Taylor, cited in Doe v. Perkins, 3 T. R. 749, where a witness produced a copy of a day-book which he had left at home; and Legge, B., held that if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it; but if he could not

from recollection swear any further than as finding the matters entered in the book, then the original should have been produced. And Anonymous, 1 Lew. 101, where Bayley, J., is reported to have held that a witness cannot give a copy of a shop-book in evidence to prove facts contained in the shop-book, but if he was originally acquainted with the facts he might refer to such copy to refresh his memory.

(*r*) Reg. v. Duffield, 5 Cox, C. C. 404. It is plain that where a copy is made whilst the matters are fresh in the memory of the witness, it may just as well be used to refresh the memory as if it were the original. Suppose the witness made two memoranda whilst the matters were fresh in his memory, either might be so used.

book from his own knowledge, and the tradesman copied the entries day by day into a ledger, in the presence of the clerk, who checked them as they were copied; it was held that the clerk might use the entries in the ledger to refresh his memory, although the waste-book was not produced, nor its absence accounted for; as the entries in the ledger were in the nature of entries made by the clerk himself. (s) A witness cannot refresh his memory by extracts made by another person from minutes or memoranda made by the witness himself. (t)

It is not essential that the memorandum should have been contemporaneous with the fact; it seems to be sufficient if it has been made by the witness, or by another with his privity, at a time when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory, or enables him to swear to the truth of the fact. (u) When a witness refreshes his memory from memorandums, it is always usual, and very reasonable, that the adverse counsel should have an opportunity of looking at them, when he is cross-examining the witness. (v)

A writing cannot be used to refresh the memory, if it appears to have been made for the purpose of the cause. Thus where a witness refreshed her memory by papers in her own handwriting, some of which were in the form of a deposition, which was drawn by the plaintiff's solicitor, whom she had requested to digest her notes and reduce them to some order; and, after he had done so, she transcribed and altered them whenever it was necessary, to make them consistent with her meaning; it was held that she ought not to have been allowed to refresh her memory by these notes. (w)

The general rule is, that a witness must not be examined as to his opinion, for his testimony must be confined to evidence of facts; but in questions of skill and judgment, men of science or experience are allowed to give evidence of their opinion. Thus in a civil case, in an inquiry as to an embankment choking up a harbour, an engineer has been admitted to prove, from his own experiments, what were the effects of natural causes upon that particular harbour, and on other harbours similarly situated on the same coast, and that the removal of the bank would not, in his opinion, restore

At what time the memorandum must be made.

The adverse party may look at the memorandum.

Writing made for the purpose of the cause is unavailable.

Examination as to opinion.

Questions of skill and judgment.

(s) *Burton v. Plummer*, 2 A. & E. 341. In this case, Patteson, J., said, 'The copy of an entry, not made by the witness contemporaneously, does not seem to me to be admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced, and that rule appears to me to be applicable, whether the paper be produced as evidence in itself, or used merely to refresh the memory.'

(t) 2 Phill. Ev. 414, citing a case mentioned by Lord Kenyon, C. J., in *Doe v. Perkins*, 3 T. R. 752.

(u) 1 Stark. Ev. 177. 2 Phill. Ev. 414.

(v) By Eyre, C. J., in *Hardy's case*, 24 How. St. Tr. 824. 2 Phill. Ev. 411. *Sinclair v. Stevenson*, 1 Carr. & P. 82. But if a paper is put into a witness's

hands merely to prove a handwriting, the other side have no right to see it. *Ibid*, per Best, C. J. If a counsel, in cross-examination, put a paper into the witness's hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence. And he may also ask the witness when it was written, without being bound to read it. *Rex v. Ramsden*, 2 C. & P. 604, by Lord Tenterden. *Howard v. Canfield*, 5 D. P. R. 417.

(w) *Anonymous*, cited in *Doe v. Perkins*, 3 T. R. 752. The case was in chancery, and the Lord Chancellor suppressed the depositions. In *Skeineller v. Newton*, 9 C. & P. 313, a similar objection was made, but the point decided was that the paper was not written near enough to the transaction.

the harbour. (*x*) So shipbuilders have been admitted to state their opinion on the sea-worthiness of a ship, from examining a survey, which had been taken by others, and at which they were not present. (*y*) Where the question is, whether a seal has been forged, seal-engravers may be called to show the difference between a genuine impression and that supposed to be false. (*z*) So on an indictment for forging a will, which, together with writings in support of it, it was suggested had been written over pencil marks, which had been rubbed out; an engraver who had examined the paper with a mirror and traced the pencil marks, was held competent to give evidence of what he had discovered upon such examination. (*a*) So in several cases where the genuineness of certain handwriting has been in question, persons skilled in the examination of handwriting, and in the detection of forgeries, as inspectors of franks, and clerks of the post office, have been allowed to state their opinion whether a particular writing was in a genuine or imitated character. (*b*) By 28 & 29 Vict. c. 18, s. 8, as mentioned *ante*, p. 437, comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writing, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

Opinion of  
medical men.

In criminal cases, the opinions of medical men of science are very frequently employed as evidence. A physician who has not seen the patient, may, after hearing the evidence of others, be called to prove, on his oath, the general effect of the disease described by them, and its probable consequences in the particular case. (*c*) The testimony of medical men is constantly admitted with respect to the cause of disease, or of death, in order to connect them with particular acts, and as to the general sane or insane state of the mind of the patient, as collected from a number of circumstances. Such opinions are admissible in evidence, although the professional witnesses found them entirely on the facts, circumstances, and symptoms established by others, and without being personally acquainted with the facts. (*d*) Thus where on a trial for murder the medical witnesses called on the part of the prosecution ascribed the death to strangulation, other medical men called on behalf of the prisoner were allowed to give their opinion

(*x*) *Folkes v. Chad*, MS. 1 Phill. Ev. 291, 7th ed., cited by Buller, J., in *Goodtitle v. Braham*, 2 T. R. 498. So the opinion of a person conversant with the business of insurance may be asked as to whether the communication of particular facts would have varied the terms of insurance, though not what his conduct would have been in the particular case. *Berthon v. Loughman*, 2 Stark. N. P. C. 258. *Holroyd, J.*, but see *contra* *Durrell v. Bederley*, Holt, N. P. C. 236, by Gibbs, C. J.

(*y*) *Thornton v. Royal Exchange Assurance Company*, Peake, N. P. C. 25. *Chaurand v. Angerstein*, *ibid.* 43. *Beckwith v. Sydebotham*, 1 Campb. 117. See *Alcock v. Royal Exchange Assurance*

*Company*, 13 Q. B. 292, where evidence that a captain was addicted to drunkenness was held admissible in order to show that he was incapable of exercising a sound judgment in selling a ship.

(*z*) By Lord Mansfield in *Folkes v. Chad*, *ubi supra*.

(*a*) *Reg. v. Williams*, 8 C. & P. 434. *Parke, B.*, after consulting *Tindal, C. J.*

(*b*) *Goodtitle v. Braham*, 4 T. R. 497. *Rex v. Cator*, 4 Esp. N. P. C. 117, 145. *Stranger v. Searle*, 1 Esp. 14. But see *Gurney v. Langlands*, 5 B. & A. 330. *Cary v. Pitt*, Peake Ev. App. 84.

(*c*) *Peake Ev.* 190.

(*d*) 1 Stark. Ev. 175.

that, from the evidence they had heard upon the trial, the death did not arise from strangulation, although they had not seen the body of the deceased, and had no means of forming a judgment of the cause of his death except from the evidence given in court. (*e*) So in prosecutions for murder, medical men have been allowed to state their opinion, whether the wounds, described by witnesses, were likely to be the cause of death. (*f*) So in a case of murder, (*g*) where the defence was insanity, the twelve judges were unanimous in thinking that a witness of medical skill might be asked, whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it. But several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz., whether, from the other testimony given in the case, the act as to which the prisoner was charged was, in his opinion, an act of insanity. (*h*) And it has been since held that a physician who had heard the whole evidence on a trial for murder might be asked whether the facts and appearances proved showed symptoms of insanity. (*i*)

A person of experience in the profession of the law of another country may state his opinion, what, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. (*j*)

Opinion as to law of another country.

It is usual for the Court, at the instance of either party, in criminal as well as civil cases, to make an order that the witnesses, intended to be examined on either side, shall remain out of court during the examination of the other witnesses; (*k*) and it was formerly held that if any person were present contrary to that order, he could not, on any account, be permitted to be examined. (*l*) But an attorney was not within the rule, and might remain, and still be admissible as a witness, his assistance being in most cases absolutely necessary to the proper conduct of a cause. (*n*) And it used to be considered that it was in the discretion of the judge whether he would allow the witness to be examined if he had been in court in defiance of an order to withdraw. (*o*) But it is now clearly settled that the Court cannot lawfully refuse to permit the examination of the witness, though he may be fined for

Ordering witnesses out of court.

(*e*) *Rex v. Shaw*, MSS. C. S. G. *cor.* Pattenon, J. S. C. 6 C. & P. 372.

(*f*) 1 Phill. Ev. 290, 7th ed.

(*g*) *Rex v. Wright, R. & R.* 456.

(*h*) It seems that in *Reg. v. M'Naghten*, 10 Cl. & F. 200, such questions were allowed to be asked. 29 Law Mag. 396. See vol. 1, p. 121.

(*i*) *Rex v. Searle*, 1 M. & Rob. 75.

(*j*) *Rex v. Wakefield, cor. Hullock, B., Murray's ed.* p. 238, in which case a gentleman at the Scotch bar was examined as to whether the marriage, as proved by the witnesses, would be a valid marriage according to the Scotch law. See *ante*, p. 421.

(*k*) The order is made, on the application of a prisoner as an indulgence, not as a matter of right. 1 Chit. Cr. L.

618. 1 Burn. Just. tit. *Evidence*, 999.

(*l*) *Attorney-General v. Bulpit*, 9 Price, 4. But see *Rex v. Webb, cor. Best, J.*, MS. Mann. Dig. p. 324.

(*n*) *Pomeroy v. Baddeley, R. & M. N. P. C.* 430. *Littledale, J. Everett v. Lowdham*, 5 C. & P. 91, *Bosanquet, J.* And it is now the ordinary course to permit, not only attorneys, but professional or scientific persons, to remain in court, the rule being considered as not applying to witnesses of those descriptions. C. S. G.

(*o*) *Parker v. M'William*, 6 Bingh. R. 683. *Beamon v. Ellice*, 4 C. & P. 585, *Taunton, J. Rex v. Colley, M. & M.* 6 C. & P. 380.

disobeying the order to leave the court ; (*p*) and his wilful disobedience of the order may afford matter of remark on the value of his testimony.

A prosecutor merely as such has a right in a criminal case to remain in court, but if he is to be examined as a witness, the Court will order him to leave the court as well as the other witnesses. (*q*)

It sometimes happens that it is desirable that an argument as to the evidence of a witness should not be heard by him, and in such a case it is almost a right for the party desiring it to have the witness out of court while a discussion is going on as to his evidence. (*r*)

Upon the trial of a misdemeanor, the defendant is not entitled to the assistance of counsel to cross-examine witnesses, when he reserves to himself the right of addressing the jury ; but counsel may argue for him any points of law that arise, and may suggest the questions to be put to the jury. (*s*)

Though the counsel for the prosecution has closed his case, and the counsel for the prisoner has taken an objection as to a defect in the evidence, the judge is at liberty to make any further inquiry of the witnesses he thinks fit, in order to answer the objection. In *Rex v. Remnant*, (*t*) on a case reserved for the opinion of the judges, none of them seemed to have any doubt but that it was competent and proper for the judge to do so.

### SEC. III.

#### *How the Credit of Witnesses may be Impeached.*

Method of impeaching credit of witnesses.

There are four methods by which a person may impeach the credit of a witness who is called against him, besides the disproval of the facts stated by the witness. 1. By cross-examination. 2. By proof of statements made by him previous to his examination, inconsistent with his present evidence. 3. By proof of his acts and declarations touching the matters in issue. 4. By general evidence of his character.

1. By cross-examination of the witness as to his own conduct, &c.

1. As to impeaching the credit of a witness by cross-examination. If a witness be asked a question, for the purpose of showing him unworthy of credit, the answer to which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge (as, for instance, if he be asked whether he has been guilty of theft, fraud, or any offence subjecting him to a penalty or criminal proceeding), he is not obliged to answer. (*u*) So a witness is

(*p*) *Cobbett v. Hudson*, 1 E. & B. 11.  
*Chandler v. Horne*, 2 M. & Rob. 423,  
*Erskine, J.*

(*q*) *Reg. v. Newman*, 3 C. & K. 252,  
*Lord Campbell, C. J.* *Charnock v. Dewings*,  
3 C. & K. 378. See *Selfe v. Isaacson*,  
1 F. & F. 194.

(*r*) *Reg. v. Murphy*, 8 C. & P. 297,  
*Coleridge, J.*

(*s*) *Rex v. White*, 11 M. & W. 100.

*Ellenborough. Rex v. Parkins, R. & M.*  
*N. P. C. 166, Abbott, C. J.*

(*t*) *R. & R. 136.*

(*u*) See the cases collected, 2 Phill. Ev.  
417. 1 Stark. Ev. 190. See also *ante*, p.  
560, as to the obligation to answer where  
the answer might subject to a civil suit.  
The protection is not confined to ques-  
tions where the answer would lead to an  
immediate conclusion of guilt, but ex-

not bound to answer whether he wrote an advertisement referring to libellous letters which a prosecutor had received; and though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself. (v) An accomplice who is admitted to give evidence against his associate in guilt, though bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; for he is not protected as to such offences. (w) So a witness in custody upon a charge of felony cannot be asked, 'Have you not said that you committed the offence for which you are now in custody?' (x) So where a witness stated that he was in a room which he had let to a club on a night on which it was alleged that money had been lost by gaming; it was held that he was not bound to answer the question, 'Was there a roulette table in the room?' as his answer might tend to involve him in the danger of 'being indicted as the keeper of a common gaming house. (y) But although a witness is not compellable to answer questions of this description, it should seem that such questions may legally be asked. (z)

Questions  
tending to  
criminate.

Such questions  
may be asked.

It seems that to entitle a party called as a witness to the privilege of silence, the Court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. (a)

It is for the  
Court to judge  
whether the  
answer is  
likely to  
criminate.

tends to all questions that tend to criminate the witness, 'and the reason is that the party would go from one question to another; and though no question might be asked, the answer to which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him.' Per Lord Tenterden, *C. J. Rex v. Slaney*, 5 C. & P. 213. Thus where a witness in an action by the indorsee against the drawer of a bill, where the defence was usury, was asked whether the bill had ever been in his possession before, and the witness said he thought his answer would have a tendency to convict him of the offence of usury, for which he had been indicted, it was held that he was not bound to answer the question. *Cates v. Hardacre*, 3 Taunt. 424. See *Maloney v. Bartley*, 3 Campb. 210.

(v) *Rex v. Slaney*, 5 C. & P. 213, Lord Tenterden, C. J.

(w) West's case, MS. 2 Phill. Ev. 419.

(x) *Rex v. Pegler*, 5 C. & P. 521, Park, J. A. J., and Littledale, J.

(y) *Fisher v. Ronalds*, 12 C. B. 762.

(z) See the observations of the judges in *Rex v. Watson*, 2 Stark. 149. *Rex v. Holding and Wade*, O. B. 1821, *cor.* Bayley, J., MS., Archb. Crim. Pl. 238. S. C. 1 Archb. Pract. 193. *Harris v. Tippet*, 2 Campb. 637, Lawrence, J. *Contrà*, *Rex v. Lewis*, 4 Esp. N. P. C. 225. *M'Bride v. M'Bride*, *ibid.* 242; but see 2 Phill. Ev. 426. Indeed, if the imputation contained in a question is

connected with the inquiry and the point in issue, that the fact may be proved by other evidence, and the adverse party intends to call witnesses for that purpose, the witness proposed to be discredited must be asked whether he has been guilty of the offence imputed, *post*, p. 580. And Lord Tenterden, has ruled that the counsel in a cause have no right to object, in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture; such objection belongs to the witness only. *Thomas v. Newton*, M. & M. 48 note (a) to *East v. Chapman*. The privilege of refusing to answer questions on the ground that they tend to criminate is that of the witness alone, and neither party to the suit can take any advantage therefrom. A witness called on the part of the Crown to prove bribery against the defendant, refused to give evidence on the ground that his evidence would tend to criminate himself, the objection being overruled by the judge, he gave his evidence. Held, that the defendant could not object that such evidence was improperly received. *R. v. Kinglake*, 11 Cox, C. C. 499.

(a) *Reg. v. Boyes*, 1 B. & S. 311. *Osborn v. London Dock Co.* 10 Exch. R. 698, where Parke, B., said that this was the opinion of the majority of the judges in *Reg. v. Garbett*, 1 Den. C. C. 236. But that report expressly states that the majority of the judges 'did not decide, as the case did not call for it, whether the more declaration of the witness on

If danger appear great latitude is to be allowed to the witness.

The danger must be real and not imaginary.

Effect of a pardon.

Effect of a

But if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question; as there is no doubt that a question, which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. (b)

It has also been laid down that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. A merely remote and naked possibility, out of the ordinary course of law, such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. (c)

Where a pardon for an offence has been granted, the rule appears to be that the pardon removes the privilege of a witness of not answering questions, provided they are relevant to the issue; (d) but where the adverse party is attacking the witness, he is justified in refusing to answer what would disgrace him, although he has obtained a pardon. (e)

Where a witness had received a certificate under the repealed oath that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering. See also *ex parte Fernandez*, 10 C. B. 3, and *Bartlett v. Lewis*, 12 C. B. (N. S.) 249. In *Fisher v. Ronalds*, 12 C. B. 762, 22 L. J. C. P. 62, *Jervis, C. J.*, and *Maule, J.*, expressed strong opinions that it was for the witness and not for the judge to determine whether the answer might tend to criminate. *Maule, J.*, said, 'It is the witness who is to exercise his discretion, not the judge. The witness might be asked, "Were you in London such a day?" and though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him.' In *Adams v. Lloyd*, 3 H. & N. 351, *Pollock, C. B.*, cited the dictum of *Maule, J.*, and said, 'I have always thought that the law on that subject was correctly stated by *Maule, J.*, and added, 'It is impossible to satisfy the judge without exposing the whole matter; and a man may be placed under such circumstances with respect to the commission of a crime, that if he disclosed them he might be fixed upon by his hearers as a guilty person; so that the rule is not always the shield of the guilty; it is sometimes the protection of the innocent, although very likely it was originally introduced from humane motives, being probably derived from the maxim *nemo tenetur seipsum accusare*.' In *Chester v. Wortley*, 17 C. B. 410, *Jervis, C. C.*, said, that 'In *Fisher v. Ronalds*, my brother *Maule* and I thought that it was for the witness and not for the judge to determine whether or not the answer to a particular question may tend to criminate him. Some judges, however, have entertained a different opinion; but intimated no change in his own opinion. This case and *Adams v. Lloyd* were subsequent to *Osborn v. The London Dock Company* (which was cited in both of them), and *Reg. v. Garbett*. In *Bartlett v. Lewis*, *supra*, *Byles, J.*, said, 'I do not concur with some of the observations which have been made as to the nature and the reasons for the privilege which a witness has to protect himself from answering as to a matter having a tendency to criminate him. The rule was intended for the protection of the innocent and not for that of the guilty.' (b) *Reg. v. Boyes, supra*, *Osborn v. London Dock Co., supra*, per curiam. (c) Per curiam, *Reg. v. Boyes, supra*, where, after a pardon of bribery, it was held that the risk of an impeachment was not sufficient to protect the witness from answering. (d) *Reg. v. Boyes*, 1 B. & S. 311. (e) Per *Crompton, J.*, *ibid.* stating that that is the distinction between *Reg. v. Boyes* and *Reg. v. Reading*, 7 How. St. Tr. 259, 296, where the question was put in the cross-examination of a witness for the Crown; and the *Earl of Shaftesbury's* case, 8 How. St. Tr. 817, where the question was put by a grand juror to test the character of a witness. See *M. & M. 193*, note (b).



enactment 15 & 16 Vict. c. 57, s. 10, which protected witnesses, who had made a true disclosure touching corrupt practices at the election of members of parliament, it was held that the witness was bound to answer, whether he had received any sums of money from a person charged with bribery, as that certificate protected him from all penal actions, penal disabilities, and criminal prosecutions of every kind. (*f*)

certificate  
under the  
Bribery Act.

And where in an action on a bill of exchange the defence was, that the bill was drawn and accepted for the balance of an account of stockjobbing transactions, and one of the parties to the transaction objected to answer the question, on the ground that his answer might subject him to penalties under the Stockjobbing Acts; but the transaction had taken place more than three years before the trial, and the witness did not know that any proceeding had been commenced against him; Lord Tenterden, C. J., held that the witness was bound to answer the questions put to him. (*g*)

Where the  
time for pro-  
secution is  
passed.

As to questions which are asked, upon cross-examination, for the purpose of throwing discredit on a witness, and which tend merely to disgrace and degrade him, without subjecting him to a penalty or criminal charge, the authorities are conflicting on the point whether he is compellable to answer them. It seems that he is not. In *Cooke's case*, (*h*) on an indictment for high treason, the prisoner, in order to challenge a juryman, asked him if he had not said he was guilty and would be hanged. Lord C. J. Treby overruled the question, and said, 'You may ask upon the *voire dire* whether he has any interest in the cause; nor shall we deny you liberty to ask, whether he be fitly qualified according to law by having a freehold of sufficient value; but that you may ask a juror or witness every question that will not make him criminous, that is too large. Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer; for, although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy, and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty: his crime is purged. But merely for the reproach of it, it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself. So persons have been excused from answering, whether they have been committed to Bridewell as pilferers or vagrants, &c.; yet to be suspected is only a misfortune and shame—no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable.'

Questions  
tending to  
degrade.

So in *Layer's case*, (*i*) the court would not allow the witness to be examined on the *voire dire*, as to whether he had been promised a pardon or reward for swearing against the prisoner; and Lord C. J. Pratt said, 'If the objection goes to his credit, must he not be sworn, and his credit left to the jury? *No person is to discredit himself*, but is always taken to be innocent till it appear otherwise.'

(*f*) *Reg. v. Charlesworth*, 2 F. & F.

(*g*) *Roberts v. Allat*, M. & M. 192.

326. *Ex parte Fernandez*, 10 C. B.

(*h*) 4 St. Tr. 748.

(N. S.) 3. *In re Fernandez*, 6 H. & N.

(*i*) 10 St. Tr. 259. 2 Phill. Ev. 424.

717. See vol. 1, p. 326.

In *Sir John Friend's case*, (*f*) who was tried for high treason, it was held that a witness could not be asked whether he was a Roman Catholic, because he might subject himself to penalties by his answer; and Treby, C. J., said, 'No man is bound to answer any questions that will subject him to penalties or to infamy.' There are two modern decisions at Nisi Prius, in accordance with the doctrine laid down by the chief justices in the above cases. In *Rex v. Lewis*, (*g*) which was an indictment for an assault, the prosecutor, in the course of cross-examination, was asked if he had not been in the House of Correction in Sussex, and Lord Ellenborough, C. J., interposed, and said, that that question should not be asked; that it was formerly settled by the judges, among whom were Treby, C. J., and Powell, J., both of whom were great lawyers, that a witness was not bound to answer any question, the object of which was to degrade, or render him infamous. *M'Bride v. M'Bride* (*h*) was an action of assumpsit, in which a woman being called as a witness for the plaintiff, the counsel for the defendant was proceeding to examine her as to her living in a state of concubinage with the plaintiff, but Lord Alvanley interposed, and said, he thought questions as to general conduct might be asked, but not such as went immediately to degrade the witness. His lordship added, 'I do not go so far as others may. I will not say a witness shall not be asked to what may tend to disparage him; that would prevent an investigation into the character of a witness, which it may often be of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness.'

In the trial of *O'Coigley and O'Connor* (*i*) for high treason, where a witness was asked, on cross-examination, how many informations he had laid for the purpose of throwing an imputation on him as a common informer, whereupon he appealed to the protection of the court: it was held that the question should not be repeated or followed up by another.

Where on a trial for burglary a witness for the prosecution was asked in cross-examination whether he had not been charged with a crime, and imprisoned two years; Cresswell, J., held that the question might be put, but the witness was not bound to answer it, as the matter was of an infamous nature. (*k*)

In addition to these cases must be mentioned that of *Rex v. Hodgson*, (*l*) which was an indictment for a rape upon Harriet Halliday. After she had given her evidence, she was cross-examined by the prisoner's counsel, who put these questions to her: 'Whether she had not before had connection with other persons?' and 'Whether she had not before had connection with a particular person (named)?' It was objected that she was not obliged to answer these questions; and Mr. Baron Wood allowed the objection, on the ground that she was not bound to answer them, as they tended to criminate and degrade her. And, on a case reserved,

(*f*) 4 St. Tr. 606. 1 Stark. Ev. 206

(*g*) 4 Esp. N. P. C. 225.

(*h*) 4 Esp. N. P. C. 242.

(*i*) 26 How. St. Tr. 1353.

(*k*) Reg. v. Parker, 1 Cox. C. C. 76. Cresswell, J., referred to C. J. Treby's

opinion, *ante*, p. 575; and if the case had been of sufficient importance it seems the question would have been reserved.

(*l*) R. & R. C. C. R. 211. But see *Rex v. Barker*, 3 C. & P. 589.

the twelve judges determined that the objection was properly allowed. (m)

Though a witness be not compellable to answer degrading questions, it seems allowed (as in the case of criminating questions), (r) that the questions may legally be asked. (s) In *Rose v. Blakemore*, (t) where a witness for the plaintiff refused to answer a question, whether he had published a particular handbill, on the ground that he had been threatened with a prosecution for the publication; and the counsel for the defendant, in his address to the jury, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny it, would not injure him; Abbott, C. J., interposed and said, that no such inference ought to be drawn, and that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact inquired into. And in *Lloyd v. Passingham*, Lord Eldon expressed a similar opinion. (u)

If the question be of a tendency to criminate or degrade, and the witness answers it, the cross-examining party must be satisfied with the answer, and will not be allowed to falsify it by evidence; (v) that is, if the question be merely collateral to the point in issue; for if it be relevant to it, and the witness deny the thing imputed, evidence may be called to contradict. Thus where a witness for a prosecution in larceny had been asked, in cross-examination, whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged of him, and would soon fix him in gaol, and had denied both; Lawrence, J., ruled, that as to the former, his answer must be taken as conclusive; but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness. (w)

Witness's answer conclusive.

A witness cannot be

Where on an indictment for murder, which was prosecuted by

(m) See *Dodd v. Norris*, 3 Campb. 519. *R. v. Holmes*, 41 L. J. M. C. 12. *Rex v. Pitcher*, 1 C. & P. 85. The following cases are in favour of the position that a witness is compellable to answer questions tending to disgrace or disparage. *R. v. Edwards*, 4 T. R. 440. *Frost v. Holloway*, Ms. 2 Phill. Ev. 428. *Cundell v. Pratt*, Moo. & Mal. 108. See the cases, *ante*, p. 573.

(r) See *ante*, p. 573.

(s) See 1 Stark. Ev. 212.

(t) *R. & M. N. P. C.* 382. See *R. v. Watson*, 2 Stark. N. P. C. 157.

(u) 16 Ves. 64. See the note of the Reporters in *Rose v. Blakemore*, in which doubts are ably expressed, with deference to such high authorities, whether these *dicta* be not inconsistent with the general principles on which the rules concerning the right of witnesses to refuse an answer to questions have been established.

(v) *Rex v. Watson*, 2 Stark. R. 149, 151, 158. *Rex v. Clarke*, 2 Stark. R. 244, per Holroyd, J. *Harris v. Tippet*, 2 Campb. 637, *cor.* Lawrence, J. For

the court will not try a collateral question whether the witness has been guilty of the misconduct imputed to him. However, in this case of *Harris v. Tippet*, which has been relied upon by very high authorities in support of the general rule (see *Rex v. Watson*, 2 Stark. 155, 158), it may be perhaps doubted whether the decision of the learned judge in this particular instance was correct, although the principle laid down by him undoubtedly is so. The witness being called for the defendant, was asked whether he had not attempted to dissuade a witness examined for the plaintiff from attending the trial; the question, therefore, it may be argued, was not altogether collateral, but so connected with the cause that other witnesses might be called to contradict him. See the Queen's case, 2 B. & B. 311, *post*, p. 588, and see the cases where a prosecutrix in rape has been contradicted by other witnesses, *ante*, p. 388.

(w) *Yewin's case*, 2 Campb. 638; see *Harris v. Tippet*, 2 B. & B. 313, and *post*, p. 588.

asked whether  
he is a spy.

the attorney-general for the government, a police officer, on cross-examination, stated that he had attended a meeting by the direction of the commissioners of police, and that his instructions were to attend the meeting and report, and that he attended the meeting and reported; he was asked whether he attended as a spy, and the question was objected to. Lord Campbell, C. J., 'I am of opinion that it is irregular, not on the ground that the witness is called on to criminate himself, and may refuse to answer, but on the ground that he is called upon to draw an inference from the facts. It will be open to the counsel for the prisoner to denigrate the witness a spy hereafter if he think fit; but I am of opinion that he cannot ask the witness "Did you go as a spy?"' (x)

Privilege of  
the witness  
only.

The privilege of refusing to answer is the privilege of the witness, and not of the party; for that reason, Lord Tenterden, C. J., refused to allow counsel to support, by argument, the privilege as belonging to the party whom he represented. (y) It was formerly held that if a witness answered any questions on cross-examination on a matter rendering himself liable to forfeiture or punishment, he could not afterwards claim his privilege, but must answer throughout. (z) And so if a witness voluntarily answered questions tending to degrade him on his examination in chief, he was bound to answer on cross-examination, however penal the consequence may be. (a) But it has since been held that it makes no difference in the right of a witness to protection that he has chosen to answer in part; and the witness is entitled to protection at whatever stage of the examination he chooses to claim it. (b)

A witness is  
entitled to  
protection at  
any time, and  
although he  
may have an-  
swered in part.

A witness may  
be asked  
whether he  
has not been  
previously  
convicted, &c.

By the 28 & 29 Vict. c. 18, s. 6, (c) 'a witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal parts) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court, where the offender was convicted, or by the deputy or clerk of such officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

Could a wit-  
ness be asked  
whether he  
had been con-  
victed?

Where before the C. L. P. Act, 1854, s. 25, an almost similar clause to the above enactment, the defendant was asked in cross-examination whether there had not been proceedings against him in the county court at the suit of one Agutta in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury notwithstanding found their verdict for the then plaintiff,

(x) Reg. v. Barnard, 1 F. & F. 240.  
(y) 2 Phil. Ev. 418, citing Thomas v. Newton, M. & M. 48 n.

(z) East v. Chapman, M. & M. 46.  
Lord Tenterden, C. J., Dixon v. Vale, 1 C. & P. 278. Best, C. J.

(a) Per Dampier, J., Winchester Sum. Ass. 1815, Mann. Ind. Witness, 222.

(b) Reg. v. Garbett, 1 Den. C. C. 236.

(c) This section is almost the same as the C. L. P. Act, 1854, s. 25.

and it was objected that the question could not be put without producing the record of the proceedings in the county court; and the objection was overruled, and the defendant answered that there had been such proceedings, in which he had given evidence, and that he had lost the verdict; the Court held that no new trial ought to be granted by reason of this question having been allowed, and said, 'We dissent from the *obiter dictum* of Cresswell, J., in *Macdonnell v. Evans*, as to what stands upon the same ground, viz., the necessity of producing the record of the conviction in order to found the question, on cross-examination, "Have you been convicted?" Upon a question collateral to the issue, as a rule, the questioner is bound by the answer; so that extraneous evidence is vain. Either the witness answers, "I have been convicted," and the question is useless, or he denies it, and then (apart from the Common Law Procedure Act 1845, s. 25, which does not touch this case) the proof of the conviction is forbidden. It cannot be given in evidence before the witness has answered, for it is not evidence in the cause. It could not be given in evidence after, because the answer is conclusive; and so of the proceedings in the county court in the present case. The case of *Macdonnell v. Evans*, the *Queen's case*, (f) and numerous other cases, in which it has been held that documents must be produced, are cases in which either the document would have been evidence upon the issue, or to contradict the witness if he answered in a particular way, or in which the precise terms and language of the documents were necessary to be referred to in order to answer the question. This is not a question as to the contents of a written document.' (g)

Where a witness called for a plaintiff was asked on cross-examination by the defendant's counsel, who produced a letter purporting to be written by the witness, 'Did you not write that letter in answer to a letter charging you with forgery?' it was held that the question could not be put. The rule is that the best evidence in the possession or power of the party must be produced. Generally the original document is the best evidence; but circumstances may arise in which secondary evidence of its contents may be given. In this case these circumstances did not exist. For anything that appeared, the defendant's counsel might have the letter in his hand when he put the question. It was sought to give evidence of a letter without in any way accounting for its absence, or showing any attempt made to obtain it. The best evidence of the document was not tendered. (e)

A witness cannot be asked, 'Did you not write that letter in answer to one charging you with forgery?'

(f) 2 B. & B. 288, 292.

(g) *Henman v. Lester*, 12 C. B. (N. S.) 776. Byles, J., *dissentiente*.

(e) *Macdonnell v. Evans*, 11 C. B. 930. The court, however, studiously guarded against laying down any general rule, Jervis, C. J., saying, 'It is unnecessary, as it seems to me, for the court to lay down any general rule upon this subject.' During the argument, Maule, J., said, 'If you want the jury to know that there was a letter containing a charge of forgery, the proper way to do so is by producing the letter itself;' and again, 'Suppose the witness

had said, "I did write this letter in answer to another which is in court," good sense obviously requires that the letter should be produced, if it is wished to get at its contents;' and in giving judgment, 'Suppose we assume that the paper was shown to the witness, and he was asked, "Did you not say Yes in answer to something contained therein?" can it be contended that the contents of the paper could not be shown? It seems to me that if the document was present, the proper way of dealing with it would be to produce it, and then to ask the witness, "Did you not write so and so in

2. By proof of contradictory statement.

A foundation must be laid on cross-examination.

Mode of laying a foundation for proof of contradictory statements.

2ndly. The credit of a witness may be impeached by giving evidence of his having said or written touching the cause what is at variance and inconsistent with his testimony on the trial. (*h*) But in order to lay a foundation for such discrediting evidence, it is necessary first to ask the witness, when it is proposed to discredit by proof of contradictory *verbal* statements, upon cross-examination, whether he has made the statement or declaration, or held the conversation which it is intended to prove. (*i*) Thus if a witness, on being examined in chief as to some transaction supposed to have occurred between certain persons, should admit that he had heard of such a thing, but does not know its cause, it would be irregular to prove his having made a declaration respecting the cause, in order to show his knowledge of the cause, without first asking him in the cross-examination whether he had not made such a declaration; or if he had answered that he did not remember the transaction, it would be equally irregular, without such previous cross-examination, to prove declarations made by him respecting the transaction for the purpose of showing that he must have remembered it: (*j*) for it would, in many cases, have an unfair effect upon the witness and upon his credit, and would deprive him of that reasonable protection which it is the duty of the court to afford to every person who appears as a witness, to allow proof of his former conversation without first interrogating him as to that conversation, and reminding him of it, in order to call up all the powers of his memory as to the transaction. (*k*) And it is not enough to ask the general question, whether the witness has ever said so and so, because it may frequently happen that, upon the general question, he may not remember having said so; but the witness must be asked as to the time, place, and person involved in the supposed contradiction; because, when his attention is challenged to particular circumstances, he may recollect and explain what he has formerly said. Where, therefore, a witness had denied that he had ever said that he was in partnership with the defendant, but had not been questioned as to the particular person, or conversation; Tindal, C. J., refused to allow a witness to be asked whether on a

answer to it?" The court treated the question in this case exactly the same as if it had arisen on an examination in chief. In *Boosey v. Davidson*, 13 Q. B. 257, which was an action for the infringement of a copyright of certain airs in an opera, a witness was asked whether he had not seen printed copies of these airs in a particular shop; and it was held that the question could not be put, as the answer would be a statement of the contents of a written instrument, without accounting for its non-production.

(*h*) *De Saily v. Morgan*, 2 Esp. N. P. C. 691. *Christian v. Combe*, 2 Esp. 489. See *ante*, p. 525, as to the depositions of a witness before a magistrate being used for this purpose. In order to impeach the credit of a witness for a defendant upon an information for assaulting revenue officers, by proving that on an information before two magistrates against the same defendant for the same offence

goods in his possession he gave a different account of the matter, proof of the conviction containing the testimony of the witness is insufficient; it is necessary to prove it by the testimony of those who heard what was said. *Rex v. Howe*, 1 Campb. 461. S. C. 6 Esp. 125.

(*i*) *The Queen's case*, 2 B. & B. 299. *Carpenter v. Wall*, 11 A. & E. 803.

(*j*) *The Queen's case*, 2 B. & B. 299.

(*k*) 2 B. & B. 300. *Abbot, C. J.*, in delivering the opinion of the judges, added that, in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation, the court would, of its own authority, call back the witness in order to give him an opportunity of doing so. Another reason why he ought to be cross-examined is, that he may have an opportunity of explaining his conduct, 2 B. & B. 314.

particular occasion the witness had told him that he was in partnership with the defendant. (l)

By the 28 & 29 Vict. c. 18, s. 5, (m) 'a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, (n) his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge at any time during the trial to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.' This clause, by sec. 1, applies to 'all courts of judicature as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence;' and consequently any court of sessions trying any offence, or any justice or justices hearing any charge of any offence, may require the production of any writing, &c., though the word 'judge' alone occurs in the clause.

This 5th section is the same in substance as the 17 & 18 Vict. c. 125 (The Common Law Procedure Act 1854) s. 24. As it is obvious that some questions are likely to arise upon this 5th section, it may be well to advert to them. The clause seems to assume that the writing is in the possession of the party who is cross-examining,

A witness may be cross-examined as to written statements made by him.

Observations on the new clause.

(l) *Angus v. Smith*, M. & M. 473. The witness was allowed to be recalled, and asked the particular question; and the same rule was laid down by Parke, B., in *Crowley v. Page*, 7 C. & P. 789, *post*, p. 589, note (x), and in *Rex v. Pearce*, Gloucester Spr. Ass. 1829, MSS. C. S. G. Learned judges have in many instances allowed witnesses to be recalled in order to lay a foundation for the admission of such contradictory evidence. In *Reg. v. Harris*, Salop Spr. Ass. 1842, upon an indictment for murder, the prisoner had no counsel, and in his defence to the jury he alleged certain statements to have been made by the principal witness for the prosecution, and imputed that his son, who could prove the statements, had been prevented from attending to give evidence for him; and Patteson, J., stopped the trial, and ordered the son to be sent for, at the same time directing that no communication should be made to him of the matters as to which he was going to be examined. The prisoner having no attorney, and the son not having been examined by any one as to what statements he had heard the witness make, a difficulty arose as to the mode which was best to be adopted in the examination of the son, and the cross-examination of the witness, and the following mode was adopted as the best under the peculiar circumstances of the case:—The son was first examined by the editor, at the request of the learned judge, as to what he had heard the witness say, the witness being kept out of court during such examina-

tion, and then the witness was called in and cross-examined by the editor as to the statements which the son had sworn that he had made. The jury acquitted the prisoner, although the evidence for the prosecution was very strong. This case has been mentioned, as it may serve as a guide for the practice in cases where the prisoner wishes to call witnesses to prove contradictory statements made by witnesses for the prosecution, without having laid the ground for so doing in a proper manner. C. S. G.

(m) As to the practice on this subject before this Act, see the Queen's case, 2 B. & B. 286. If counsel suggests to the court that he wishes to have a letter written by a witness read immediately in order to found certain questions upon its contents, that cannot be well or effectually done without reading the letter itself; in that case, for the more convenient administration of justice, the letter is permitted to be read, but considering it as part of the evidence of the counsel proposing it, and subject to all the consequences of its being so considered. *Ibid.* 289, 290. When a letter is produced, the court will allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part. *Ib.*

(n) In order to contradict by the writing, it must be put in as evidence. *R. v. Riley*, 4 F. & F. 964; *R. v. Wright*, 1 F. & F. 957.

and where that is the case, no difficulty as to its production can arise. But the writing may not be in his possession, and, in the most common cases in criminal trials, the depositions are in the custody of the Court. Here however, also, no difficulty can arise, as the court will, no doubt, always permit or cause them to be used for the purpose of the clause. But the writing may be in the custody of other parties, and several questions may arise where that is the case. It may be in the custody of the prisoner, and notice to produce it may have been given, or it may be in the custody of a third party who has been subpoenaed; in either of these cases it is apprehended that the cross-examining party is entitled to prove the notice, and to call for the writing, or to call on the party subpoenaed to produce the writing: and it is now clearly settled that such a course ought at once to be adopted, and not postponed till the cross-examining party enters on his case. (o)

If the document be obtained in either of these modes, no difficulty will occur; but it may be that it may not be produced, though it is shown to be in the custody of the prisoner or witness. The question will then arise whether the judge has power to compel its production; the words 'it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection,' are perfectly general, and, if they stood alone, would seem to give the judge such power; but they occur in the proviso to the preceding part of the clause, which seems plainly to contemplate that the document is in the hands of the cross-examining party: and they seem to have been introduced for the purpose of enabling the judge to prevent an improper impression being produced by a partial communication of the contents of the writing; and, therefore, it admits of serious doubt whether it would be held that the judge was empowered in such a case by this clause to compel the production of the writing. Then, suppose the writing not to be attainable in these cases, or that it is in the possession of some person who has not been subpoenaed to produce it, and is not present; in such a case, as the power to cross-examine as to any writing is given in perfectly general terms, there seems no doubt that the right to cross-examine would exist; but as, before any contradictory proof can be given, the attention of the witness is to be called to the parts of the writing, (p) it seems to be clear that in such a case no contradictory proof will be admissible.

Where the  
paper is lost.

Lastly, if a paper written by the witness is proved to have been lost or destroyed (in which case the only mode of contradicting him would be by producing afterwards some secondary evidence of the contents of the paper), the counsel may cross-examine the witness as to the contents of such paper, (q) and this might be done before the new Act. Thus where on the trial of an indictment which had been found at the Monmouth Special Commission, it was proved that at that Commission the depositions of the witnesses had been frequently produced, and that they had been mislaid, and that diligent search had been made for them several times, and they could not be found; Patteson, J., held that a witness might be cross-examined as to what he had said before the magistrates by a

(o) Boyle v. Wiseman, 11 Exch. R. 360, and other cases, *post*, s. 7. (p) See Sladden v. Serjeant, 1 F. & F. 322.



copy of the depositions, which was proved to be a correct copy. (r)

A witness, who has been examined before commissioners in a bankruptcy, may be asked whether he had mentioned a fact, which he had just mentioned, before the commissioners, without putting his examination into his hand, as the object is to show that he did not mention the fact, and he may admit that if he chooses; if he does not ask for the examination to refresh his memory, he may answer without it if he chooses. (s)

Statement before Commissioners of Bankruptcy.

It was once said that, if the counsel who cross-examines puts a paper into the witness's hand, and puts questions on it, and anything comes of the questions founded upon it, the opposite counsel has a right to see the paper, and re-examine upon it; but if the cross-examination founded on the paper entirely fails, the opposite counsel has no right to look at it. (t) But it has since been laid down that whenever counsel puts a document into the hands of a witness, and asks him whether it is in his handwriting, and then proceeds to found any question on such document, the counsel on the opposite side has a right to see it; and the only case in which the opposite counsel has not this right is where counsel, after handing the document to the witness (and asking him whether it is his handwriting), goes no further. (u)

Right of the opposite counsel to inspect documents.

If a letter or other writing be tendered in evidence for the purpose of contradicting a witness, and a question is raised whether it was written by the party, it is for the judge to determine that question. (w)

The judge is to decide as to the writer of a paper.

Since the 28 Vict. c. 18, s. 5, it seems that the rules laid down by the judges as to the mode of cross-examining witnesses for the Crown with respect to what they have previously sworn before the magistrate, and which has been reduced into writing in their depositions, are no longer in force. (x)

Cross-examination on deposition.

The rules, which it seems applied to depositions before a coroner, (y) will be found in 7 C. & P. 676. (z)

(r) Reg. v. Shellard, 9 C. & P. 277.

(s) Ridley v. Gyde, 1 M. & Rob. 197, Tindal, C. J.

(t) Reg. v. Duncombe, 8 C. & P. 369, Lord Denman, C. J.

(u) Per Erle, J., in Cope v. The Thames Haven Dock Company, 2 C. & K. 757. The words between brackets are inserted from the marginal note, and render the passage consistent with the regular practice.

(w) Cooper v. Dawson, 1 F. & F. 550. Wightman, J. Boyle v. Wiseman, 11 Exch. R. 360.

(x) As to the practice before the above Act, see R. v. Taylor, 8 C. & P. 726; R. v. Holden, 8 C. & P. 606; R. v. Edwards, 8 C. & P. 26; R. v. Price, 7 Cox, C. C. 405; R. v. Moir, 4 Cox, C. C. 279; R. v. Newton, 4 Cox, C. C. 262; R. v. Edwards, 8 C. & P. 26; R. v. Curtis, 2 C. & K. 763; R. v. Peel, 2 F. & F. 21.

(y) R. v. Barnett, 4 Cox, C. C. 269; but see R. v. Maloney, 9 Cox, C. C. 26.

(z) These rules are: 1. That where a witness for the Crown has made a depo-

sition before a magistrate, he cannot, on his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel. 2. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it. 3. That the witness cannot, in cross-examination, be compelled to an-

A deposition cannot be put into the hand of the witness, and the witness asked whether he adheres to his previous statement.

Whether the judges would look at the depositions.

Reading a deposition to a witness.

Depositions lost.

The same rule applies to the counsel for the prosecution cross-examining a witness for the defence.

Before the above Act some cases occurred in which the counsel for the prisoner, on cross-examining a witness for the prosecution, offered to put into his hand his deposition, and then proposed to ask him whether, having looked at the paper, he still persevered in the statement already made in his evidence in court; Parke, B., and Coltman, J., had some doubt as to the propriety of this course; but, it having been permitted by some judges, they thought it right to allow it. They, however, asked the opinion of the judges whether they were right, and the judges were of opinion that the course pursued was inexpedient, and that it ought not to be allowed in future. (a)

In one case, before the above Act, it seems to have been considered a fitting course for the judge to look at the depositions while the witnesses were under examination, and question them as to any discrepancy between them and their evidence; (b) but in other cases learned judges have refused, where counsel were employed by the prisoner, to look at the depositions at all. (c)

Where, before the above Act, the deposition was put in the hands of a witness, and on being asked to read it he said he could not read writing, it was held that there was no objection to the deposition being read over to him, and the officer of the court read it over to him accordingly. (d)

In a case, before the above Act, where it was proved that the depositions had been regularly taken against the prisoner before the magistrates, and returned to the proper officer, and that officer proved that he had made diligent search after them, and could not find them; Patteson, J., held that the prisoner's counsel might cross-examine from copies of them, which were proved by the magistrate's clerk to be correct. (e)

The same rule applies as to the cross-examination of a witness on his deposition by the counsel for the Crown as by the counsel for the prisoner. (f)

swer whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event, the counsel for the prisoner may proceed with his cross-examination, and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effects of it upon the other part of his testimony; or, if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

(a) Anonymous, cited in *Reg. v. Ford*, 2 Den. C. C. 245, from the MSS. of Parke, B. April 1843. *Reg. v. Ford*, 2 Den. C. C. 245. 5 Cox, C. C. 184. Spring Ass. 1851. *Reg. v. Palmer*, 5 Cox, C. C. 236. Pollock, C. B. S. P. April, 1851. *Reg. v. Brewer*, C. C. 409, S. P. Blackburn, J. Jan. 1863.

(b) *Rex v. Edwards*, *supra*. This is a course which has not unfrequently been adopted in cases where the prisoner has had no counsel, and in such cases it appears highly expedient, as prisoners rarely have copies of the depositions unless they are defended by counsel, and, even if they had, probably would not be able properly to avail themselves of any contradictions that might arise; and it is to be remembered that the depositions are returned to the judge for the express purpose of enabling him to judge as to the accuracy of the witnesses. C. S. G.

(c) *Rex v. Thomas*, 7 C. & P. 817. Parke, B., as stated 8 C. & P. 27, and that statement is correct. *Reg. v. Holden*, 8 C. & P. 606.

(d) *Rex v. Edwards*, 8 C. & P. 26. Littledale, J., and Coleridge, J. But see *Reg. v. Tooker*, 4 Cox, 93 (b). *Reg. v. Matthews*, 4 Cox, C. C. 93, August 1849. Probably this case is inaccurately reported. See *R. v. Ford*, *supra*.

(e) *Reg. v. Shellard*, 9 C. & P. 277.

(f) *Reg. v. Muller*, 10 Cox, C. C. 43. Pollock, C. B., and Martin, B.

In a case, before the above Act, where, when the prisoners were first brought before the magistrate charged with the felony, the witnesses were sworn, examined by the magistrate, and cross-examined by the prisoners, and written minutes of the examination and cross-examination were made by the clerk to the magistrates under the inspection of the magistrates, these minutes were then sent to the office of the clerk to the magistrates, and there delivered to a clerk named Tasker, who proceeded to write the depositions from the minutes. The witnesses attended in the office, and in the course of writing the depositions Tasker put some questions to each of them, for the purpose of rendering the depositions more correct, clear, and complete. The answers given to these questions were inserted in the depositions. The magistrate was not present, nor were the prisoners at the office of the clerk to the magistrates. The depositions having been thus written, the witnesses appeared again before the magistrates, and in the presence of the prisoners were resworn; the depositions were read over to them, and a full opportunity was afforded for cross-examination before the depositions were signed by the witnesses. Upon these circumstances appearing on the trial, the counsel for the prisoners proposed to ask one of the witnesses for the Crown this question, 'Did you not tell Mr. Tasker that you were watching the prisoner Christopher till a quarter before one o'clock?' The question was material, and had reference to what was said by the witness in answer to some question put by Tasker, as above stated, in the course of writing the depositions, and the witness's answer would, according to the evidence, appear on the depositions. The depositions were not read or tendered in evidence. The question was overruled by the court; and it was contended, on a case reserved, that if it were a legal deposition, it only excluded an inquiry into what took place before the magistrate. It was answered that, if Tasker had taken down the answers, and the witness had signed them, that paper would exclude evidence of what was said, and that it was like a statement contained in a letter. (g) *Wilde, C. J.*, 'We think the question proper and legal, and that an answer should have been required. It is objected that the answer was to be found in a paper signed by the witness, which must be regarded as a deposition, having acquired that character from the circumstances under which it was made. But the ground upon which a deposition is exclusive evidence of a matter contained in it, is the presumption that the magistrate has done his duty, and taken down all that was material in the testimony of the witness. But Tasker was a mere stranger; he could not, by any act of his, attach to the writing a character which would exclude parol evidence of what was so written; it does not become primary evidence of such matter: the witness's own words are the primary evidence of the statement. Suppose the witness had said something, and had then written it down himself, his writing would not exclude his speech. Why then should Tasker's writing do so? The whole argument was founded on an incorrect analogy. The conviction, therefore, was wrong.' (h)

The depositions only exclude the actual matter which takes place before the magistrate. Where therefore minutes were taken of the examinations of witnesses before the magistrate, and then a clerk, in the absence of the prisoners and magistrate, drew up depositions from the minutes, asking the witnesses any question that occurred for the purpose of explanation, it was held that the prisoner's counsel had a right to ask what a witness said in answer to a question put by the clerk in the absence of the magistrate.

(g) It was also contended that the deposition was not a legal deposition at all; but no opinion was pronounced on this objection. (h) *Reg. v. Christopher*, 1 Den. C. C. 533. In the course of the argument

What questions may be asked to lay a foundation for contradictory evidence.

In what cases evidence may be called to contradict.

In order to lay a foundation for contradicting a witness, the questions asked upon cross-examination must, in some way, be relevant to the matter in issue. Thus in an action for usury, the person with whom the contract, alleged to be usurious, had been made, was produced as a witness for the plaintiff, and the counsel for the defendant proposed to cross-examine him as to other contracts he had made with other persons, which were not usurious; intending, if the witness answered in the affirmative, to draw the conclusion that he had made the same contract with the defendant, and if the witness denied the nature of those other contracts, to call evidence to prove the contrary, and thereby destroy the witness's credit. But Lord Ellenborough refused to suffer the question to be put, conceiving it to be entirely irrelevant to the issue in the cause; and the Court of King's Bench were afterwards all of opinion that he had acted properly; and they laid down the rule, that it is not competent for counsel on cross-examination to question the witness concerning a distinct collateral fact, which, if answered affirmatively, is wholly irrelevant to the matter in issue, for the purpose of discrediting him, if he answers in the negative, by calling other witnesses to contradict him. (*i*) It need hardly be observed, if a question be wholly irrelevant, and therefore improperly asked on cross-examination, and the witness nevertheless give an answer to it, the cross-examining party may not call evidence to contradict that answer; but it is further to be remarked, that many questions may be asked with propriety on cross-examination, which are irrelevant to the matter in issue, yet are allowable because they go to the credit of the witness; but the distinction is, as to the right to call evidence to contradict answers given to questions put to shake a witness's credit, that if the questions go merely to his credit, and are in other respects collateral to the issue, evidence cannot be called to contradict the answers; if they not only go to his credit, but are also connected with the subject of inquiry, then it is allowable to call witnesses to contradict. Thus if a witness be asked, on cross-examination, whether he has been guilty of a crime, or any conduct which would discredit him as a witness, but is unconnected with the matters in issue, and he denies it, his answer is conclusive. (*j*)

So where on the trial of an information charging a maltster with having used a cistern for making malt without having previously entered it, a witness was asked on cross-examination whether he had not said that the officers of the Crown had offered him 20*l.* to say that the cistern had been used, and he denied having said so; it was held that evidence was inadmissible to prove that he had said so; for the contradiction would be on a matter wholly irrelevant, and would in no way affect the character of the witness. (*k*)

Maule, J., said, 'Tasker usurped an authority. He can no more exclude parol evidence of the witness's statement by reducing it to writing than any one present at a seditious meeting can exclude parol evidence of words there spoken by choosing to make a memorandum of them.'

(*l*) *Spencely v. De Willott*, 7 East, R. 108. It seems that the new Act has not limited the right of a party calling a witness to contradict him on facts relevant

to the issue, *Greenough v. Eccles*, 28 L. J. C. P. 160, 5 C. B. N. S. 786.

(*j*) *Ante*, p. 577.

(*k*) *A. G. v. Hitchcock*, 1 Exch. R. 91. Pollock, C. B., said, 'The test whether the matter is collateral or not is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence—if it have such a connection with the issue that you would be allowed to give it in evidence—then

Where on a trial for rape the prisoner called a witness, who stated that he could not speak English, and was accordingly sworn and examined in Irish, through an interpreter, and on cross-examination he again denied that he could speak English, and he also denied that he had spoken in English to two girls within the last few days, and these girls were called, and proved that he had so spoken to them in English; upon a case reserved, it was held that the evidence of these girls ought not to have been admitted. (*l*) But where a woman, who was the only witness to prove an abominable offence, swore that she did not know the prisoner previously, evidence was admitted that they knew each other well, and were, in fact, intimately acquainted. (*m*)

As to speaking English.

As to knowing the prisoner.

Where in an action on a joint and several promissory note made by the father and grandfather of the defendant, who was sued as the administrator of his grandfather, the defence was that the plaintiff had forged the note in question, and also another note, in order to cover the forgery of the first note, and a charge had been preferred against the plaintiff for the forgery before the magistrates, but dismissed; the defendant was examined as a witness, and was asked on cross-examination whether his father had not, after the charge was preferred against the plaintiff, said in his presence that 'he was sorry he had forgotten that he had signed two notes.' The defendant answered in the negative. It was held that the plaintiff's counsel could not call a witness, in whose presence the father had made the statement, for the purpose of showing that the father had made the statement, and that the defendant had heard it; for the issue sought to be raised was purely collateral. (*n*) So where in an action for an assault on the plaintiff's wife, she swore that the assault was of an indecent character; the defendant denied it, and on cross-examination denied other indecent assaults on some young persons; and evidence on the part of the defendant was tendered to disprove these imputations, which was objected to unless evidence was admitted in support of them; it was held that such evidence on the one side or the other was inadmissible, as the matter inquired into was quite collateral to the issue to be tried. (*o*)

Palmer v. Trower.

Tolman v. Johnstone.

it is a matter on which you may contradict him. [But this seems to be much too narrow a rule, and so said O'Brien, J., in *Reg. v. Burke*, *infra*.] If you ask a witness whether he has not said so and so, and the matter he is supposed to have said, would, if he had said it, contradict any other part of his testimony, then you may call another witness to prove that he had said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness box is not true (more accurately, in order that the jury may disbelieve or doubt the statement of the witness). It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony; and if it is neither the one

nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of inquiry.' The editor has inserted the parts between brackets. C. S. G.

(*l*) *Reg. v. Burke*, 8 Cox, C. C. 44. Three judges thought the evidence rightly received.

(*m*) *Reg. v. Dennis*, 3 F. & F. 502. The admissibility of the evidence was not disputed, and Byles, J., left it to the jury in favour of the prisoner.

(*n*) *Palmer v. Trower*, 8 Exch. R. 247. Alderson, B., said, 'It is a statement made in the presence of the defendant of a fact not within his own knowledge; if it had been made in the presence of the grandfather, who is represented by the defendant, the case might have been different.'

(*o*) *Tolman v. Johnstone*, 2 F. & F. 26. Alderson, C., after consulting the other judges of Q. B.

A witness may be contradicted as to facts showing his state of mind towards the opposite party.

Whether a witness is the mistress of the plaintiff.

Where the misconduct relates to the subject of the inquiry.

Contrary statement on a previous trial.

It is allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind, and whether he has not used expressions imputing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other; and if he denies it, evidence may be given as to what he said, not with the view of having a direct effect, but to show what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed. (*p*) Where therefore, in an action on a promissory note (in which the defence appears to have been that the note was forged), the female servant of the plaintiff, who was one of the attesting witnesses to the note, was asked on cross-examination whether she did not constantly sleep in the same bed with the plaintiff, which she denied; Coleridge, J., held that a witness might be called by the defendant to contradict her; as the question was whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him to support a forgery: just in the same way as if she had been asked if she was the sister or daughter of the plaintiff, and had denied that. But if the question had been whether the witness had walked the streets as a common prostitute, that would have been a collateral issue, and, if she had denied it, she could not have been contradicted. (*q*)

If the imputed misconduct be relative to the subject of inquiry, as, if a witness for the Crown be asked whether he had not said that he would be revenged on the prisoner, and would soon fix him in gaol, (*r*) or whether he had not made declarations to procure persons corruptly to give evidence in support of the prosecution, (*s*) then evidence may be called to contradict him, if he denies the words or declaration imputed to him. Thus where on an indictment for an indecent assault on a girl, another girl denied in cross-examination that two letters were in her handwriting; and on the part of the prisoner, the suggestion was that the charge was the result of a conspiracy among the children and their parents; it was held that it might be proved that these letters were in the handwriting of the girl, and that the letters might be read; but that they were only evidence for the purpose of detracting from the credit of the girl. (*t*)

Where on one trial the jury were discharged, and on the second trial a witness admitted in cross-examination that she had been in England and had prosecuted for a felony; it was held that it might be proved that on the former trial she had denied that she had ever been in England or had prosecuted there; for, no matter whether the question was relevant or irrelevant to the present

(*p*) Per Pollock, C. B., A. G. v. Hitchcock, *supra*.

(*q*) Thomas v. David, 7 C. & P. 350. In Melhuish v. Collier, 15 Q. B. 883, Coleridge, J., said, 'The principle I went upon in Thomas v. David was that the fact was one that the defendant might have proved in chief.'

(*r*) Yewin's case, 2 Campb. 638.

(*s*) The Queen's case, 2 B. & B. 311.

(*t*) Reg. v. M'Gavaran, 6 Cox, C. C. 64. Williams, J. The letters spoke of sticking to the charge made against the prisoners, but there was no proof that they had been delivered to the persons to whom they were addressed.

issue, it went to the consistency of her evidence on the two trials. (u)

If the witness declines to give any answer to such a question proposed to him, by reason of the tendency thereof to criminate himself, and the court is of opinion that he cannot be compelled to answer, the adverse party has also, in this instance, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. (v)

When the witness declines to answer.

In one case, where a witness said on cross-examination that he had no recollection of a certain declaration one way or the other, without expressly denying it; Tindal, C. J., held that a person could not be called to prove such declaration; as he had never heard such evidence admitted in contradiction, except when the witness had expressly denied the declaration. (w) But in a later case where a witness neither admitted nor denied a verbal statement relevant to the matter at issue; Parke, B., held that evidence was admissible to show that the witness had made such a statement. (x)

And now by the 28 & 29 Vict. c. 18, s. 4, 'if a witness on cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.' (xx)

Where a witness does not directly answer.

3rdly. The credit of a witness may be impeached, not only by giving evidence to prove statements made by him at variance with his testimony, but by calling witnesses to prove his declarations and acts touching the subject-matter of inquiry. (y) And the rules above stated, as to the necessity of a previous cross-examination of the witness whom it is proposed to discredit, apply equally to this method of discrediting him as to the last. So that if it is intended to offer evidence of former declarations of a witness, or of acts done by him, though not with a view to contradict his statement upon oath in examination in chief, but with a view of discrediting him as a corrupt witness; in this case also it has been determined that

3. By proof of witness's acts and declarations touching the cause.

Previous cross-examination necessary.

(u) *Reg. v. Rorke*, 6 Cox, C. C. 196. Lefroy, C. J., and Monahan, C. J.

(v) *The Queen's case*, 2 B. & B. 313, 314.

(w) *Paine v. Beeston*, 1 M. & Rob. 20.

(x) *Crowley v. Page*, 7 C. & P. 789. The learned Baron said, 'Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible, in order to impeach the value of that testimony; but it is only such statements as are relevant that are admissible, and in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose

presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice, and if it were not so you could never contradict a witness who said he could not remember.'

(xx) This section is similar to the C. L. P. Act, 1854, s. 23. See *Ryberg v. Ryberg*, 32 L. J. P. M. & A. 112.

(y) *The Queen's case*, 2 B. & B. 311.

the witness should be previously questioned as to such declarations, or such acts, on the cross-examination; (z) for in the one case as well as the other an opportunity must be afforded the witness of explaining his conduct before evidence can be adduced to impeach his credit by proof of the fact. Thus where the witness's moral character is relevant to the issue, expressions of the witness may be proved without the previous inquiry, if they tend merely to disgrace the witness by showing that he has made unbecoming declarations; but even if they be of such a nature, the introductory question must not be dispensed with, if they tend likewise to contradict some part of the witness's evidence. Therefore in an action for seducing the plaintiff's daughter, which the daughter proves, the defendant cannot give evidence that she has talked of another person as her seducer and the father of her child, unless she be first asked on cross-examination whether she ever used those expressions. (a)

Re-examina-  
tion.

After a witness had been cross-examined respecting his former statements and declarations, for the purpose of affecting his credit, the counsel who called him has a right to re-examine him so as to give him an opportunity of explaining such statements and declarations. Thus if that which the witness has stated in answer to the question on his cross-examination arose out of the inquiries of the person with whom he had the conversation, the witness may be asked in re-examination what those inquiries were. (b) And he may also be asked what induced him to give to that person the account which he has stated in the cross-examination. (c)

But this, it should seem, is the limit of such a re-examination. Lord C. J. Abbott, in delivering his opinion in the *Queen's case*, said, 'I think the counsel has a right, upon a re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and, also, of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.' (d)

Conversations  
with a party  
to a suit and  
with a third  
person.

His lordship afterwards observed, 'I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are, in themselves, evidence against him in the suit, and, if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination: provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what

(z) 2 B. & B. 311.

(b) 2 B. & B. 295.

(a) *Carpenter v. Wall*, *supra*, 11 A. & E. 803.

(c) *Ibid.*

(d) 2 B. & B. 297.



he said on the same occasion. But the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations has been laid before the court, the court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant and incompetent.' (e)

But the reasoning and the grounds of the supposed distinction have been since considered by the Court of Queen's Bench, and after full consideration that court overruled the distinction, and adopted the more safe and intelligible principle that the office of re-examination is to be confined to showing the true colour and bearing of the matter elicited by cross-examination, and that new facts or new statements, not tending to explain the witness's previous answers, ought not to be admitted. (f)

Thus where an accomplice being cross-examined with a view to throw discredit on his testimony, confessed that he had committed two robberies the same night as the one charged in the indictment, and on re-examination it was proposed to ask him as to the particular circumstances attending those robberies, and the persons in whose company they were committed, in order to show that the prisoners were the persons; Littledale, J., refused to allow it, observing that the cross-examination having been only with a view to the witness's discredit, it was not competent to the counsel for the prosecution, on re-examination, to ask questions not arising out of such cross-examination, in order to criminate the prisoners. (g)

4thly. The credit of a witness may be impeached by proof of his general character. It is now completely settled with respect to this mode of discrediting a witness, that general evidence only, and not evidence as to particular facts, can be employed; (h) for if it were allowable to give evidence of particular collateral facts to affect his credit, the inquiry might branch out into an indefinite number of issues. Besides which, although a witness may be supposed capable of defending his general character, no man can come prepared to give an answer to particular facts, which might be sworn against him to impeach his character, without any previous notice

4. By proof of witness's character.

(e) 2 B. & B. 297, 298. The other judges, except Mr. Justice Best, agreed with the Lord Chief Justice; but the Lord Chancellor and Lord Redesdale were of the same opinion with Mr. J. Best, and differed from the other judges, inasmuch as they thought that the entire conversation ought to be admitted, not as evidence of any fact that might be asserted in the course of it, but solely and simply as explanatory of the witness's motives, and as setting his character and credit in a fair, full, and impartial point of view.

(f) 2 Phil. Ev. 443, citing *Prince v. Samo*, 7 A. & E. 627, where in an action for a malicious arrest, a witness called for the plaintiff stated on cross-examina-

tion that the plaintiff had instituted a prosecution for perjury against a witness examined against him in the action in which he had been arrested, and that the plaintiff had said that he had been remanded by the Insolvent Debtors' Court; on his re-examination it was proposed to ask him whether the plaintiff had not also, on the trial of the indictment, sworn that the advance in question was a gift and not a loan; but Lord Denman, C. J., ruled that the question could not be put, and the court held that the ruling was right.

(g) *Fletcher's case*, 1 Lew. 111.

(h) *Rex v. Watson*, 2 Stark. N. P. C. 149; *Priddy v. O'Connell*, 2 Phil. Ev. 430. 1 Stark. Ev. 237.

given to him. (*i*) The proper mode, therefore, of examining a witness, who is called to discredit a previous witness by proof of his character, is to ask whether the present witness has had the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath. (*j*) In order to answer this question negatively it is not necessary that the witness should ever have heard such person give evidence on oath, as the real question is whether the witness has such a knowledge of the person's character and conduct as enables him conscientiously to say that it is impossible to place any reliance on any statement that such person may make. (*k*) It has been held upon an indictment for perjury that a witness for the defendant could not be asked whether, from having heard a witness for the prosecution give evidence on the trial of a former cause, he considered that the testimony of that witness could be relied on; nor whether he ever heard him commit perjury; nor whether he would not believe the witness because he had heard him commit perjury; as the witness must speak for the general character. (*l*)

Where upon an indictment for stealing money it was opened on the part of the Crown that an accomplice and one Mercer would be called as witnesses; Parke, J., both before and after those persons were called, allowed the prisoner's counsel to ask the other witnesses for the prosecution whether the accomplice and Mercer were not persons of very bad character. (*m*)

In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge, and the grounds of his opinion, or may attack his general character. (*n*)

Where a witness on cross-examination stated that he had become bail for a witness who had been previously examined, and he believed it was on a charge of keeping a gaming-house; in order to prevent any impression being thereby made against the character of the previous witness, Gaselee, J., and Taunton, J., allowed the previous witness to be recalled, and asked whether the charge of keeping the gaming-house was in fact a true charge or not. (*o*)

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses. (*p*) Thus in a case where a witness for one party asserts one thing, and a witness for the other party asserts the contrary, and direct fraud is not imputed to either, evidence to the good character of either witness is not admissible. (*q*) But if the character of a witness has been impeached (although, according to some authorities, upon cross-examination only), evidence on the other side may be given in support of the character of the witness by general evidence of good conduct. (*r*) So in a case where two

Character of  
witness, how  
supported.

(*i*) Bull. N. P. 296.

(*j*) Mawson v. Hartsink, 4 Esp. N. P. C. 102. R. v. Brown, 36 L. J. M. C. 59; 10 Cox, C. C. 453.

(*k*) Rex v. Bispham, 4 C. & P. 392. Parke, J., and Garrow, B.

(*l*) Rex v. Hemp, 5 C. & P. 468. Lord Denman, C. J.

(*m*) Rex v. Nicholson & Co.

(*n*) 1 Stark. Ev. 238.

(*o*) Rex v. Noel, 6 C. & P. 336.

(*p*) Bishop of Durham v. Beamont, 1 Campb. 207. 1 Stark. Ev. 252.

(*q*) 1 Campb. 207.

(*r*) 1 Stark. Ev. 252. Bate v. Hill, 1 C. & P. 100. Rex v. Clarke, 2 Stark. N. P. C. 241, where the prosecutrix, upon indictment for an attempt to commit

attesting witnesses to a will, which was impeached on account of fraud in procuring it, were dead, and a surviving attesting witness was called, and spoke to a fraudulent execution, it was held allowable to call evidence to the general good character of the deceased witnesses: (s) and Lord Ellenborough, in approving of that decision, observed, that if they had been alive they might have been produced, and their characters would have appeared on cross-examination; and being dead, justice required that an opportunity should be given of showing what credit was to be given to their attestation. (t) Whether in answer to proof of statements made by a witness in variance with his testimony at the trial, evidence may be given by the party who called the witness, that he affirmed the same thing on other occasions, and is still consistent with himself, is a point on which there are conflicting authorities. (u) The better opinion seems to be that such evidence is not admissible, except in cases where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship; there, in order to repel such imputation, it may be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. (v) Thus where Neville was indicted for perjury committed on the trial of Barnes for setting fire to a rick, and Heming swore that Barnes was with him at a distance from the rick, but on cross-examination admitted that, on the trial for arson, he had given a different account, which tended to support the charge against Barnes; he said, however, that the day after the fire he had told the facts to Morgan, a constable, as he now stated them, and that he had been induced to make a false statement on the trial for arson; it was held that Morgan might be called to prove that Heming had made a statement to him the day after the fire for the purpose of setting up the witness, but that the particulars of the statement could not be asked by the counsel for the Crown. (w)

Previous similar statements.

By the 28 & 29 Vict. c. 18, s. 3, 'a party producing a witness shall not be allowed to impeach his character by general evidence of bad character, (x) but he may, in case the witness shall, in the opinion of the judge, prove adverse, (y) contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent (z) with his present testi-

How far a party may discredit his own witness.

a rape, having been cross-examined as to having been sent to the house of correction on a charge of theft, evidence of her subsequent good conduct was admitted in support of the prosecution: *cor.* Holroyd, J.; but see *Dodd v. Norris*, 3 Campb. 519.

(s) By Lord Eldon in *Doe v. Stephenson*, 3 Esp. 284. By Lord Kenyon in *Doe v. Walker*, 4 Esp. 50. *Provis v. Reed*, 5 Bingh. R. 435.

(t) 1 Campb. 210.

(u) Gilb. Ev. 135. Bull. N. P. 294.

(v) 2 Phill. Ev. 445. 1 Stark. Ev. 253. See also the opinion expressed by Bayley, J., in *Whien v. Law*, 3 Stark. N. P. C. 63. See also *ante*, Book VI., chap. 1, s. 3, *Of Hearsay Evidence*.

(w) *Reg. v. Neville*, 6 Cox,

*Williams*, J.

(z) As to the practice before this Act see *Ewer v. Ambrose*, 3 B. & C. 750. Bull. N. P. 297.

(y) A witness is not adverse within the meaning of this section, merely because his testimony is unfavourable to the party calling him. To be "adverse" so as to entitle the party calling the witness to prove that he has made at another time a statement inconsistent with his present testimony, he must in the opinion of the judge be "hostile." *Greenough v. Eccles*, 5 C. B. (N. S.) 786. 28 L. J. C. P. 160. See *Martin v. Travellers' Insurance Company*, 1 F. & F. 505.

(z) See *Jackson v. Thomas*, 31 L. J. Q. B. 11. 1 B. & S. 745. *Ryberg v. Byg*, 32 L. J. Mat. Ca. 112.

mony ; (a) but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. (b)

If a witness gives evidence contrary to that which the party calling him expects, the party is at liberty to make out his own case by other witnesses, and to show that the facts which his own witness had stated contrary to his interests were otherwise ; (c) for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only. (d)

The judge may put in the deposition of a witness who gives a contrary statement on the trial.

Before the above Act, upon an indictment for murder, the counsel for the prosecution at first declined examining the prisoner's mother, but the judge thought it right to have her examined (her name being on the back of the indictment as having been examined before the grand jury), which was accordingly done, and she gave her evidence in favour of the prisoner ; the judge ordered her deposition before the coroner to be read, in order to show its inconsistency with her present testimony. And the twelve judges afterwards were of opinion, that the judge had a right to call for the deposition, in order to impeach the witness's credit ; and Lord Ellenborough and Mansfield, C. J., thought that the prosecutor had the same right. (e)

#### SEC. IV.

##### *How many Witnesses are necessary.*

Single witness generally sufficient.

In general, the testimony of a single witness is a sufficient legal ground for conviction of a crime or misdemeanor, (f) even though that single witness may have been the accomplice in guilt of the accused person. (g) But there are two exceptions to this rule, viz., the cases of treason and perjury.

In case of perjury.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury ; as in such case there would be only one oath against another. (h)

High treason.

In high treason, no one can be convicted, unless by the oaths and testimony of two witnesses, either both to the same overt act, or one of them to one, and the other of them to another overt act of the same treason ; unless the party indicted shall willingly,

(a) As to the rule on this subject before the above Act, see 2 Phill. Ev. 450. *Wright v. Beckett*, 1 M. & Rob. 414. *Dunn v. Aslett*, 2 M. & Rob. 122. *Holdsworth v. Mayor of Dartmouth*, 2 M. & Rob. 153. *Winter v. Bull*, 2 M. & Rob. 357. *Allay v. Hutchings*, 2 M. & Rob. 358. *Melhuish v. Collier*, 15 Q. B. 878. *Greenough v. Eccles*, *supra*. *R. v. Farr*, 8 C. & P. 768.

(b) There is a similar provision to this in the C. L. P. Act, 1854 ; see sec. 22.

(c) 3 B. & C. 749, 750, 751. *Fridlander v. The London Assurance Company*, 4 B. & Ad. 193. *Richardson v. Allan*, 2 Stark. N. B. 324. *Alexander v. Gibson*, 2 Campb. 335. In *Lowe v.*

*Jolliffe*, 1 W. Bl. 365, the subscribing witness to a deed swore to the testator's insanity ; yet the plaintiff was allowed to examine other witnesses in support of his case, to prove that the testator was sane. So in *Pike v. Badmering*, cited in 2 Stra. 1096, where the three subscribing witnesses to a will denied their hands, the plaintiff was permitted to contradict that evidence.

(d) Bull. N. P. 297.

(e) *Oldroyd's case*, R. & R. 88. See the cases on this subject, *ante*, p. 525.

(f) 4 Black. Com. 357. 2 Hawk. c. 46, s. 3.

(g) *Post*, p. 600.

(h) *Ante*, p. 72.

without violence, in open court confess the same. (*i*) The confession contemplated, is a confession in open court, or pleading guilty; any other confession, whether made to persons in authority or not, is evidence in the case, and must be proved, like other facts, by two witnesses, and it will have its weight with the jury according to the circumstances, as confessions have in all criminal cases. (*j*) However, by 39 & 40 Geo. 3, c. 93, 'in all cases of high treason, when the overt act alleged in the indictment is the assassination of the King, or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial, and upon the like evidence, as if he stood charged with murder.'

Two witnesses not necessary in cases of personal attacks on the King.

## SEC. V.

### *How the Attendance of Witnesses to be compelled and remunerated.*

There are two methods in which the attendance of witnesses in criminal cases may be compelled: 1st—which is the more ordinary and effectual means—the justice or coroner that takes the examination of the person accused, and the information of the witnesses, may at that time, or at any time after and before the trial, bind over the witnesses to appear. (*k*) 2ndly, by process of subpoena.

Attendance of witnesses, how compelled.

1st. If a witness does not appear, according to the terms of the recognizance in which he is bound, at the court at which the trial is intended to be, to give evidence against the party accused, the recognizance may be estreated, and the penalty levied. Justices have authority by the 11 & 12 Vict. c. 42, s. 20, to bind all persons (*l*) by recognizance to give evidence in all cases of treason, felony, and misdemeanor, and coroners have the like authority, by the 7 Geo. 4, c. 64, s. 4, in cases of murder and manslaughter. By the 11 & 12 Vict. c. 42, s. 20, if a witness who has been examined before a justice of the peace refuses to be bound over, the justice may commit him until the trial of the accused, unless in the meantime he duly enters into a recognizance to prosecute or give evidence; and as this is merely an enactment of the previously existing law, it should seem that a coroner has the same power where a witness refuses to enter into a recognizance before him. (*m*) And where before the 11 & 12 Vict. c. 42, the witness was a

By recognizance.

(*i*) By the 1 Edw. 6, c. 12, s. 22. 6 Edw. 6, c. 11, s. 12. 7 & 8 Will. 3, c. 3. In high treason concerning the coin, or the King's seals, or sign manual, one witness was sufficient, as at common law before the reign of Edward VI.; by the 1 & 2 Ph. & M. c. 10, s. 12, and 1 & 2 Ph. & M. c. 11, s. 3 (now repealed). It was agreed by all the judges, that these statutes extended to all offences touching the impairing of coin, which should afterwards be made treason. *Gahagan's case*, 1 Leach, 42. 1 East, P. C. 329 S. C.

(*j*) 1 East, P. C. 131. *Foster's Crown Law*, 240, &c.

(*k*) 2 Hale, P. C. 232. 7 Geo. 4, c. 64, s. 4.

(*l*) As to binding the prisoner's witnesses to give evidence, see 30 & 31 Vict. c. 35, *ante*, 513.

(*m*) 2 Hale, P. C. 232. *Bennet v. Watson*, 3 M. & S. 1. In *Evans v. Rees*, 12 A. & E. 55, it was held that a warrant to bring a witness before a justice to find sufficient bail to appear and give evidence at the trial, was bad; as it did not appear that the witness had been exa-

married woman, and therefore under a legal disability to enter into a recognizance, the justice was held justified in committing her, upon her refusal to appear to give evidence or to find sureties for her appearance. (*n*)

By subpoena.

2nd. The attendance of witnesses, if they have not entered into recognizances, may be compelled by process of subpoena, which may either be issued from the Crown Office, (*o*) or may be made out by the clerk of the peace of the sessions, or the clerk of assize. (*p*) And by the 45 Geo. 3, c. 92, s. 3, the service of a subpoena on a witness in any one of the parts of the United Kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear. (*q*)

Service of subpoena.

The prosecutor ought not to include more than four persons in one subpoena. (*r*) And as soon as the writ is obtained, a copy should be made out for each witness, and served on him personally, and at the same time the writ should be shown him. (*s*) The service must be personal, and made a reasonable time before the day of trial; for witnesses ought to have a convenient time to put their own affairs in such order that their attendance on the court may be of as little prejudice to themselves as possible. (*t*)

A subpoena requiring the witness to attend on the commission days of the assizes to give evidence on a trial extends to the whole assizes, which are but one day in contemplation of law. (*u*)

Subpoena  
*duces tecum*.

If a witness have in his possession any deeds or writings, which it is deemed necessary to produce at the trial, there should be a special clause inserted in the subpoena, called a *duces tecum*, commanding the witness to bring them with him. (*v*) The writ of *subpoena duces tecum* is the regular and established process of the court; and though it was formerly doubted, yet it is now settled, that this process is of compulsory obligation on the witness to produce the deeds or writings required of him, which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the court, and not the witness, is to judge. (*w*) And a person in possession of any paper, who is served with a *subpoena duces tecum*, is bound to produce it, whether the paper belong to him or not, or though there be a regular way prescribed by law for obtaining it; (*x*) and if he refuse to do so, the Court of Queen's Bench will grant an attachment against him. (*y*) The Court, however, in all such cases, will exer-

mined before the justice, or refused to enter into a recognizance; but Lord Denman said, 'I throw no doubt on the power of the magistrate to do all that is necessary to compel the attendance of those witnesses whom he knows to be material.'

(*n*) Bennet v. Watson, *supra*.

(*o*) Rex v. Ring, 8 T. R. 585.

(*p*) 1 Chit. C. L. 608. It is more prudent to sue it out of the Crown Office, if an application for an attachment for non-attendance is likely to become necessary. See *post*, p. 599.

(*q*) 'Parts' in this Act mean England, Scotland, and Ireland; and not counties, &c. Rex v. Brownell, 1 A. & E. 598.

(*r*) Doe v. Andrews, Cowp. 846.

Tidd. 855.

(*s*) In order to save expense, it is settled that service of a ticket, containing the substance of a writ, will be as effectual as service of the writ itself. 2 Phill. Ev. 373.

(*t*) 2 Phill. Ev. 373.

(*u*) Scholes v. Hilton, 10 M. & W. 15.

(*v*) 2 Phill. Ev. 371.

(*w*) Amey v. Long, 9 East, 473. 2 Phill. Ev. 371. As to when a bank is not compellable to produce its books unless a judge of one of the superior courts so orders; see 39 & 40 Vict. c. 48, s. 8, in the Appendix.

(*x*) Tidd. 856. Corsen v. Dubois,

Holt, N. P. C. 239.

(*y*) Reg. v. Greenaway, 7 Q. B. 126.

cise their discretion in deciding what papers shall be produced, and under what qualifications as respects the interest of the witness. (z) But the court will not allow counsel for the witness to argue against his liability to produce the documents. (a) A person bringing papers under a *subpœna duces tecum* may be compelled to produce them without being sworn. (b)

If a witness who is sworn to give evidence has a document in his possession in court, he may be compelled to produce it; for he is just as much under the control of the court as if he had brought the document under a *subpœna duces tecum*. (c)

In a criminal case, if a person is in court, he may be compelled to be examined as a witness, although he has neither been bound by recognizance nor served with a *subpœna* to give evidence, and an indictment for the obstruction of a public footway is considered as a criminal prosecution for this purpose. (d)

The Court will not grant a Bench warrant to compel the attendance of a witness, who is keeping out of the way in collusion with the defendants. (e)

By the 16 & 17 Vict. c. 30, s. 9, 'it shall be lawful for one of Her Majesty's principal secretaries of state, or any judge of the Court of Queen's Bench or Common Pleas, or any baron of the Exchequer, in any case where he may see fit to do so, upon application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such court, judge, justice, or other judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of Her Majesty's superior courts of law at Westminster to be brought before such court to be examined as a witness in any cause or matter depending before such court is now by law required to be dealt with.' (f)

Person present in court.

Bench warrant.

Secretary of state may issue his warrant for bringing up a prisoner (not in custody on civil process) to give evidence.

(z) Tidd, 856. 2 Phill. Ev. 371. It will be observed that there is a distinction between the obligation of a witness to answer, though it may subject him to a civil responsibility, and the obligation to produce writings under a *subpœna*. See *ante*, p. 560. If a *subpœna duces tecum* be served, the party must bring his deeds in obedience to the *subpœna*; but if he states them to be his title deeds, no judge will ever compel him to produce them. *Pickering v. Noyes*, 1 B. & C. 263, *Rex v. Hunter*, 3 C. & P. 591, and *MSS. C. S. G.* As to whether an attorney can be compelled to produce deeds upon which he has a lien. See *Hope v. Liddell*, 24 L. J. Ch. 691. *Kemp v. King*, 2 M. & Rob. 437. *Doe v. Ross*, 7 M. & W. 102.

(a) *Doe dem. Rowcliffe v. Earl of*

*Egremont*, 2 M. & Rob. 386. *Rolfe, B.*

(b) *Davis v. Dalc, M. & Malk.* 514. *Tindal, C. J. Rex v. Murlis*, *ibid.* note. *Gaselee, J.* and *Taunton, J. Perry v. Gibson*, 1 A. & E. 48.

(c) *Snelgrove v. Stevens, C. & M.* 508. *Cresswell, J. Doe dem. Loscombe v. Clifford*, 2 C. & K. 448. *Alderson, B. Reg. v. North*, 1 Cox, C. C. 258. *Dwyer v. Collins*, 7 Exch. 639.

(d) *Rex v. Sadler*, 4 C. & P. 218. *Littledale, J.*

(e) *Reg. v. Crawford*, 6 Cox, C. C. 481.

(f) By 30 & 31 Vict. c. 35, s. 10, where recognizances shall have been entered into for the appearance of any person to take his trial for any offence at any court of criminal jurisdiction, and a bill of indictment shall be found against

*Habeas corpus  
ad testifican-  
dum.*

When a witness is in custody under civil process, or on board a ship under the command of an officer who refuses to permit his attendance, the subpoena is ineffectual, but a *habeas corpus ad testificandum* may be obtained to bring him up; for which an application may be made to any one of the judges or barons of the Courts of King's Bench, Common Pleas, and Exchequer, in England or Ireland, who have discretionary power to grant it to any part of the United Kingdom, to bring a witness before any court of record, to be examined before such court, or any grand, petit, or other jury, in any cause or matter, civil or criminal. (*g*) The application for this writ must be made upon an affidavit sworn to by the party applying, stating that the party is a material witness and willing to attend; (*h*) and if he be at a distance, it should be shown how he is material. (*i*) The writ being sued out should be left with the sheriff, or other officer, in whose custody the witness is detained, who will bring him up, upon being paid his reasonable charges. (*j*) If a witness be a prisoner of war, a *habeas corpus* will not lie to bring him up, but an order from the Secretary of State must be obtained. (*k*)

Upon an affidavit that a person confined as a lunatic is not dangerous, but in a fit state to be brought up, a *habeas corpus* may be granted in order that he may be examined as a witness. (*l*) And where a witness is under duress of some third person, as a sailor on board a man-of-war, his attendance may be obtained by the same means. (*m*)

Subpoena for  
prisoner.

At common law, a defendant in capital cases had no means of compelling the attendance of witnesses without the special order of the Court; (*n*) although in misdemeanors the defendant has always been allowed to take out subpoenas. (*o*) But the 7 Will. 3, c. 3, s. 7, provided, that in cases of high treason, where corruption of blood might be worked, the persons indicted shall have the like process of the Court where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them; and since the 1 Anne, st. 2, c. 9, s. 3, by which it is provided that witnesses for the prisoner, in case of treason or felony, shall be sworn in the same manner as witnesses for the Crown, and be subject to the same punishment for perjury, the process by subpoena is allowed to defendants in cases of felony as well as in other instances. (*p*)

Remedy  
against person

If a party, having been served with a subpoena, neglect to appear in obedience to it, an application may be made to the

him, and such person shall be then in the prison belonging to the jurisdiction of such court, under warrant of commitment, or under sentence for some other offence, it shall be lawful for the Court, by order in writing, to direct the governor of the said prison to bring up the body of such person in order that he may be arraigned upon such indictment, without writ of *habeas corpus*, and the said governor shall thereupon obey such order.

(*g*) 43 Geo. 3, c. 140. 44 Geo. 3, c. 102. 2 Phill. Ev. 374, 375.

(*h*) Rex v. Roddam, Cowp. 672.

(*i*) Tidd. 858. It is said in 1 Phill. Ev. L. 610, that the affidavit of readiness

to attend only applies when the party is on board ship, and not then in all cases.

(*j*) 2 Phill. Ev. 375.

(*k*) Furlly v. Newnham, 2 Dougl. 419.

(*l*) Feunell v. Tait, 5 Tyrw. R. 218.

(*m*) Rex v. Roddam, Cowp. 672. 1 Stark. Evid. 105.

(*n*) 4 Blac. Com. 359. 2 Hawk. c. 46, s. 170. If they had attended they could not have been sworn before the 1 Ann. st. 2, c. 9, s. 3.

(*o*) 2 Hawk. P. C. c. 46, s. 170.

(*p*) 2 Hawk. P. C. c. 46, s. 172. See ante, p. 513, as to magistrates binding the prisoner's witnesses to give evidence.



Court of Queen's Bench, if the subpoena issued from the Crown Office, for an attachment against him; (q) and where the process is served in one part of the United Kingdom for the appearance of the witness in another of the parts, the Court issuing the same may, upon proof to their satisfaction of the due service of the subpoena, transmit a certiorari of the default of the witness, under the seal of the Court, or under the hand of one of the justices thereof, to the Court of King's Bench if the service were in England, to the Court of Justiciary if in Scotland, and to the Court of King's Bench in Ireland, if in Ireland; which courts are empowered to punish the witness in the same way as if he had disobeyed a subpoena issued out of those courts, provided the expenses have been tendered. (r) It has been doubted whether in all cases, as well as in those within the last-mentioned statute, a witness may not lawfully refuse to obey a subpoena in a criminal prosecution, as well as a civil suit, unless he has a tender of his reasonable expenses; but the better opinion seems to be, that witnesses making default on criminal prosecutions are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpoena; although the Court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey. (s)

neglecting to appear on subpoena.

Expenses need not be tendered.

As to payment of witnesses' expenses and compensating them for loss of time, see vol. 1, p. 86.

A person subpoenaed as a witness, or bound over by recognition, either to prosecute or give evidence, or attending voluntarily for the *bonâ fide* purpose of giving evidence, is privileged from arrest during the necessary time occupied in going to the place where his attendance is required, in staying there for the purpose of such attendance, and in returning from that place. (t) And in allowing witnesses time sufficient for these purposes, the courts are

Protection of arrest.

(q) *Rex v. Ring*, 8 T. R. 585. And a witness who refuses, after being subpoenaed, to attend to give evidence for a defendant, is liable to an attachment as in the case of being subpoenaed by a prosecutor. 1 Stark. Ev. 86.

(r) 43 Geo. 3, c. 92, ss. 3, 4. 1 Chit. Cr. L. 614. It is said to be doubtful whether the justices at sessions, &c., have authority to issue an attachment, and that the only mode of proceeding against a witness in such a case is by indictment. Archb. Cr. L. 248.

(s) 2 Phill. Ev. 383; but see 1 Chit. Cr. L. 613. At York Summer Assizes, 1820, Bayley, J., ruled that an unwilling witness, who required to be paid before he gave evidence, could not demand it. He said, 'I fear I have not the power to order you your expenses.' And on asking the bar if any one recollected an instance, Scarlett answered, 'It is not done in criminal cases.' MS. 1 Chetw. Buru. 1001. In Reg. v. Consens, Gloucester Spr. Ass. 1843, Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London *subpœna duces tecum*, to go before the

grand jury, although he objected on the ground that his expenses had not been paid. In *Rex v. Cooke*, 1 C. & P. 321, an indictment for a conspiracy removed into the King's Bench by *certiorari*, a witness called by the defendant stated before he was examined, that at the time he was served with a subpoena, no money was paid him; he therefore asked that the judge would order the defendant to pay him his expenses before he was examined. Park, J. A. J., having consulted with Garrow, B., said they were of opinion that the judge had no power in a criminal case to order a defendant to pay a witness his expenses, although subpoenaed, and though the indictment came to be tried as a civil record. See also *Pell v. Daubeny*, 5 Exch. R. 955.

(t) *Meekins v. Smith*, 1 H. Bl. 636. *Lightfoot v. Cameron*, 2 Bl. 1113. *Childerston v. Barrett*, 11 East, 439. *Arding v. Flower*, 8 T. R. 536. But this privilege does not extend to arrests by his bail, for the purpose of being surrendered; for he is supposed to be in their custody even while attending as a witness. *Ex parte Lyne*, 3 Stark. N. P. C. 132.

always disposed to be liberal. (*u*) If a witness under these circumstances be arrested, the court out of which the subpoena issued, or the judge of the court in which the cause has been or is to be tried, will, upon application, order him to be discharged. (*v*)

Evidence of  
witnesses resi-  
dent abroad.

When any offence has arisen in India, which is tried in this country, the evidence of witnesses resident in India may be obtained in the manner prescribed by the 13 Geo. 3, c. 63, ss. 40, 44. (*w*) And in case of a prosecution for any offence committed abroad by any person employed in the public service, the evidence of witnesses resident abroad may be obtained in the mode pointed out by the 42 Geo. 3, c. 85.

## SEC. VI.

### Of Accomplices. (*x*)

pprovement.

The practice of admitting the testimony of accomplices and the promise of pardon, express or implied, under which they usually give their evidence, were introduced instead of the ancient system of approvement, which Lord Hale, in his pleas of the Crown, speaks of as having been already long disused. (*y*) Approvement was when a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices of the same crime, in order to obtain his pardon. (*z*) He was also bound to discover on oath, not only the particular crime charged upon him, but all treasons and felonies of which he could give any information. (*a*) It was purely in the discretion of the court to permit the approvement or not; if they allowed it, the party accused was put on his trial: whereon, if he was convicted, the approver had his pardon *ex debito justitiæ*: (*b*) if he was acquitted, the approver received judgment of death upon his own confession of the indictment. (*c*)

Present prac-  
tice as to ad-  
mitting accom-  
plices as  
itnesses.

All the good that could be expected from this method of approvement is now more fully provided for and secured by one of the following methods: 1st, By special proclamation in the Gazette or otherwise, pardon is sometimes promised upon certain conditions. Accomplices within this class have a *right* to pardon. (*d*) 2ndly,

(*u*) 1 Phill. Ev. 4.

(*v*) Archb. Cr. Pl. 248.

(*w*) See *ante*, p. 535, as to interrogatories by consent.

(*x*) Before the recent Act, by which a person convicted of a crime is not incompetent as a witness on that account, an accomplice was a competent witness before conviction and judgment. *Rex v. Castell Careinion*, 8 East, R. 77. 2 Hawk. P. C. c. 46, ss. 94, 95. *Tong's case*, Kel. 17, 18. 1 Hale, P. C. 303, 304. 1 Phill. Ev. 28. *Rex v. Westbeer*, 1 Leach, 12. *Rex v. Russell*, R. & M. C. C. R. 356. And this was so, though he was indicted, if not put on his trial at the same time with the prisoner against whom he gave evidence. *Bilmore's case*, 1 Hale, 305. *Rex v. Clark*, *ibid.* note. 2 Stark. Ev. 12. And see *Reg. v. Lyons*, 9 C. & P. 555, *post*, p. 619. *Sir Percy Cresby's case*, 1 Hale, P. C. 303, 1 Phill.

Ev. 28. No promise of pardon or reward rendered a witness incompetent. 2 Hale, P. C. 280. *Tong's case*, Kel. 17. *Layser's case*, 6 St. Tr. 259. 2 Hawk. P. C. c. 46, s. 135. 1 Hale, P. C. 304. 1 Phill. Ev. 27.

(*y*) 2 Hale, 226.

(*z*) 4 Black. Com. 330.

(*a*) 2 Hale, P. C. 227.

(*b*) 4 Black. Com. 330.

(*c*) *Ibid.*

(*d*) *Rex v. Rudd*, Cowp. 334, by Lord Mansfield, in giving judgment. S. P. S. C. 1 Leach, 118, 4th ed. But the promise of a pardon by proclamation in the Gazette does not give the party a legal right to exemption from punishment. *Rex v. Garside*, 2 Ad. & E. 266. He should apply to the judge to postpone the execution, in order that an application may be made to the secretary of state for a pardon.

By the practice most usually adopted accomplices are admitted to give evidence for the Crown, under an implied promise of pardon, on condition of their making a full and fair confession of the truth. (e) On a strict and ample performance of this condition, to the satisfaction of the judge presiding at the trial (although they are not of right entitled to pardon), they have an equitable title to a recommendation for the Queen's mercy. (f) They cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial, in order to give the prisoner time for an application in another quarter. (g) And if an accomplice, after being received as a witness against his companions, breaks the condition on which he is admitted, and refuses to give full and fair information, he will be sent to trial to answer for his share of guilt in the transaction. (h) It is not a matter of course to admit an offender as witness on the trial of his associates, not even

(e) *Rex v. Rudd, supra.*

(f) *Ibid.* The equitable claim to pardon does not protect an accomplice from prosecutions for other offences, in which he was not concerned with the prisoner, but it is entirely in the discretion of the judge whether he will recommend the prisoner to mercy. *Rex v. Lee, R. & R. 361. Rex v. Brunton, ibid. 454. S. C. MS. Burn's Just. by Chetwynd, tit. Ap-prover.* With respect to such offences, therefore, he is not bound to answer on his cross-examination. West's case, MS. 1 Phill. Ev. 28. Where an accomplice made a disclosure of property, which was the subject-matter of a different robbery by the same parties, under the impression that by the information he had previously given as to the robbery of other property he had delivered himself from the consequences of having the property he so disclosed in his possession; Coleridge, J., recommended the counsel for the prosecution not to proceed against the accomplice for feloniously receiving such property. Garside's case, 2 Lew. 38. It has been held in America that if an accomplice appears to have been the principal offender, he will be rejected. *The People v. Whipple, 9 Cowen, 707, Greenl. Ev. 426*; but in England principals have frequently been allowed to become witnesses against accessories. See Wild's case, 1 Leach, 17, note (a). And cases frequently occur where the accessory is far the more guilty party; as where young persons have been induced to commit crimes by the procurement of old offenders: and in such cases the young persons are not unfrequently admitted as witnesses for the Crown.

(g) 1 Phill. Ev. 28.

(h) *Ibid.* Moore's case, 2 Lew. 37. In one instance a prisoner, who had made a confession after a representation made to him by a constable in gaol, that his accomplices had been taken into custody, which was not the fact, and who, after having been admitted as a witness against

his associates, on a charge of maliciously killing sheep, upon the trial denied all knowledge of the subject, was afterwards tried and convicted upon his confession. *Rex v. Burley, cor. Garrow, B., Leicester Lent Assizes, 1818.* And the conviction was afterwards approved of by all the judges. MS. 2 Stark. Ev. 13. So where an accomplice when sworn pretended that he knew nothing of the stealing of a sheep, Coleridge, J., committed him for trial at the next assizes, when he was convicted and transported, upon proof of his statement made to a policeman before he was called as a witness. *Rex v. Smith, Gloucester Spr. and Sum. Ass. 1841.* So where an accomplice, who was called as a witness against several prisoners, gave evidence which showed that all, except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty; Parke, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried for the robbery. *Rex v. Stokes and others, Stafford Spr. Ass. 1837.* It has been held in America, that if an accomplice, having made a private confession, upon a promise of pardon made by the attorney-general, should afterwards refuse to testify, he may be convicted upon the evidence of that confession. *Commonwealth v. Knapp, 10 Pick. 477, as cited Greenl. Ev. 426.* And where an accomplice, who had made a full disclosure of the facts attending the commission of a burglary when before the committing magistrate, refused before the grand jury to give any evidence at all; Wightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *Reg. v. Holtham and five others, Stafford Spr. Ass. 1843.*

after he has been so allowed by the committing magistrate. The practice is (where the accomplice is in custody) for the counsel for the prosecution to move that the accomplice be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential. (*i*) And it is in the discretion of the Court, under all the circumstances of the case, whether the application be granted or refused. (*j*) And where one prisoner pleaded guilty, and an application was made to admit him as a witness against the other; Hill, J., directed the witnesses, who were relied upon to corroborate him, to be called first, and, if their evidence was sufficiently strong, then the accomplice might be examined as a witness. (*k*)

Where accomplice is jointly indicted.

This application is usually made before the bill is taken before the grand jury, and if the application is granted, the accomplice is not included in the indictment. (*l*) Upon an indictment for conspiracy the court allowed an acquittal to be taken against some of the defendants in order that they might be called as witnesses for the prosecution. (*m*) And the same course may be adopted, with the permission of the court, in a case of felony. (*n*) Upon an indictment for rape, as soon as the jury were sworn, it was proposed, on the part of the prosecution, that one of the prisoners should be acquitted before the case was gone into, as he was intended to be called as a witness against the other prisoners, and upon this being objected to, on behalf of the other prisoners; Williams, J. (having conferred with Alderson, B.) said, 'I had little doubt as to the course I ought to take, and my learned brother entirely agrees with me that this is a matter very much of ordinary occurrence. In cases of this kind the court, if it sees no cause to the contrary, is in the habit of relying on the discretion of the counsel who conduct the prosecution. I shall, therefore, in this case, intrust it to the discretion of the counsel whether he will have

(*i*) 2 Stark. Ev. 2. If, however, the accomplice be taken before the grand jury, by means of a surreptitious and illegal order, the indictment so found is good. Doctor Dodd's case, 1 Leach, 155. It is not usual to admit more than one accomplice. Barnsley Rioters' case, 1 Lewin 5, Parke, J. But under peculiar circumstances three have been admitted. Scott's case, 2 Lew. 36, Lord Denman, C. J. In this case the accomplices spoke to different facts, and no one could prove the whole. See Rex v. Noakes, 5 C. & P. 326.

(*j*) 1 Phill. Ev. 29. The court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus where several prisoners were committed as principals, and several as receivers, but no corroboration could be given as to the receivers, against whom the evidence of

the accomplice was required; Gurney, B., refused to permit one of the principals to become a witness. Rex v. Mellor and others, Stafford Sum. Ass. 1833. So in Reg. v. Saunders and others, Worcester Spr. Assizes, 1842, on a motion to admit an accomplice, Patteson, J., said, 'I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification, and there is no corroboration, that will not do.' And in Reg. v. Salt and others, Stafford Spr. Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness.

(*k*) Reg. v. Sparks, 1 F. & F. 388.

(*l*) 1 Phill. Ev. 29.

(*m*) Rex v. Rowland, R. & M. N. P. R. 401. So formerly if an accomplice jointly indicted with others pleaded guilty, and was fined by the court, and paid the fine (in a case where such fine might be imposed by way of punishment, and where the suffering the punishment restored the competency), he might be called as a witness by the other prisoners. Rex v. Fletcher, 1 Str. 633. See also Rex v. Sherman, C. T. H. 303.

(*n*) 1 Phill. Ev. 29.

the prisoner acquitted before the case is gone into or not. I think it almost of course.' (o)

On an indictment for murder against two prisoners, one of them, without being convicted or acquitted, was called as a witness against the other, who alone was put on her trial, it was held that this might be done; but *per* Cockburn, C. J.: 'I felt the force of what was said about the fellow prisoner coming forward to give evidence without having been first acquitted, or convicted and sentence passed. I think that was much to be lamented. In all such cases, where two persons are joined in the same indictment, and it is thought desirable to separate them in their trials in order that the evidence of the one may be taken against the other, in order to insure the greatest possible amount of truthfulness on the part of the person who is giving evidence under such remarkable circumstances, I think it would be far better that a verdict of not guilty should be taken first, or if the plea of not guilty be withdrawn, and a plea of guilty received, that sentence should be passed, in order that the mind of the witness may be free from all corrupt influences which the fear of impending punishment and the desire to obtain immunity at the expense of the prisoner might be otherwise liable to produce.' (p)

It being established that an accomplice is a competent witness, the consequence is inevitable, that if credit be given to his evidence, it requires no confirmation from another witness. (q) And therefore, in strictness, if the jury believe the evidence of an accomplice, they may legally convict a prisoner upon it, though it stands totally uncorroborated. (r) But from a consideration of the situation of an accomplice, this doctrine has been greatly modified in practice; and it has long been considered as a general rule of practice that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner. (s) It has been laid down that this practice of requiring some confirmation of an accomplice's evidence must be considered in strictness as resting only upon the discretion of the judge. (t) And this, indeed, appears to be the only mode in which it can be made reconcileable with the doctrine already stated, that a legal conviction may take place upon the unsupported evidence of an accomplice. But it may be observed that the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of law,' (u) and a deviation from it in any particular

Accomplice's evidence alone sufficient in point of law, but in practice corroboration is always deemed essential.

(o) *Reg. v. Owen*, 9 C. & P. 83. At the conclusion of the opening, the prisoner was asked whether he would give evidence, and refused, and the case proceeded against all the prisoners. See 2 Hawk. P. C. c. 46, s. 95.

(p) *Winsor v. The Queen*, 35 L. J. M. C. 121.

(q) By Lord Ellenborough in *Rex v. Jones*, 2 Campb. 133. *Rex v. Hastings*, 7 C. & P. 152, Lord Denman, C. J., Parke, J., and Alderson, B.

(r) *Rex v. Atwood*, 1 Leach, 464, also cited by Grose, J., in *Jordaine v. Lash-*

*brooke*, 7 T. R. 609. *Rex v. Durham*, 1 Leach, 478. *Reg. v. Andrews*, 1 Cox, C. C. 183. *Reg. v. Avery*, 1 Cox, C. C. 206. *Reg. v. Stubbs*, Dears. C. C. 555.

(s) 1 Phill. Ev. 31. Smith and Davis's case, 1 Leach, 479, in note (a) to Durham's case. See *per* Lord Abinger, C. B., in *Reg. v. Farler*, *post*, p. 605, and *Reg. v. Dunne*, 5 Cox, C. C. 507.

(t) 1 Phill. Ev. 32. By Lord Ellenborough, *Rex v. Jones*, 2 Campb. 132. *Rex v. Durham*, *supra*.

(u) *Per* Lord Abinger, C. B., in *Reg. v. Farler*, *post*, p. 605.

case would be justly considered of questionable propriety. (v) This confirmation need not extend to every part of the accomplice's evidence, for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence, free from suspicion. But the question is, whether he is to be believed upon points which the confirmation does not reach. And if the jury find some part of his evidence satisfactorily corroborated, this is a good ground for them to believe him in other parts as to which there is no confirmation. (w) So far all the authorities agree; the only point on which any difference of opinion has been supposed to exist, relates to the particular part or parts of the accomplice's testimony which ought to be confirmed. (x)

Where there is one prisoner there must be confirmation as to him, and where there are several, as to each.

It is well established by the current of recent authorities, that it is not sufficient to corroborate an accomplice as to the facts of the case generally, but that he must be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged. And where several prisoners are jointly indicted, and the accomplice is corroborated as to some of them, although the jury may give credit to him as to those to whom the corroboration applies, they ought to be directed to pay no attention to the evidence of the accomplice as to those against whom there is no corroboration. (y)

Upon an indictment for breaking into a warehouse and stealing a quantity of cheese, an accomplice proved that the thieves took a ladder from certain premises, and it was proved by a witness that the ladder was so taken away, and it was proposed to call other witnesses to confirm the accomplice as to the mode in which the felony was committed. Williams, J., 'You must show something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice, is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon, for, at least, knowing how the felony was committed. It has been always my opinion that confirmation of this kind is of no use whatever.' (z) So where the prisoner was indicted for stealing a lamb, and an accomplice proved that he assisted the prisoner in stealing the lamb, but the only evidence to confirm his statement was that of a witness, who found the skin of the lamb in the field where the lamb had been kept; it was held that the confirmation was insufficient; and upon its being submitted that there was evidence to go to the jury, and *Rex v. Hastings* (a) being cited as showing that the confirmation of the accomplice need not be as to the party accused; Gurney, B., said, 'Although in some instances it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the pri-

(v) 1 Phill. Ev. 32. Greenl. Ev. 426.

(w) 1 Phill. Ev. 34. 2 Stark. Ev. 14.

(x) 1 Phill. Ev. 34.

(y) See cases to the contrary, *Rex v. Dawber*, 3 Stark. N. P. C. 34. 2 Campb. 133. So in *Birkett's case*, R. & P. 251. *Reg. v. Swallow*, report of the trials at

York in 1814, cited 1 Phill. Ev. 35. 1 Phill. Ev. 37, 8th ed. *Rex v. Hastings*, 7 C. & P. 152.

(z) *Rex v. Webb*, 6 C. & P. 595. The prisoners were acquitted.

(a) *Supra*.

soner with the charge. I think that it would be highly dangerous to convict any person of such a crime on the evidence of an accomplice, unconfirmed with respect to the party accused.' (b)

The corroboration must not only connect the prisoner and the accomplice together, but must be such as to show that the prisoner was engaged in the transaction which forms the subject-matter of the charge under investigation. (d)

In *R. v. Wilkes*, 7 C. & P. 272, Alderson, B., said in summing up, 'The confirmation of the accomplice as to the commission of the felony is really no confirmation at all, because it would be a confirmation as much if the accusation were against you and me as it would be as to those prisoners who are now upon their trial. The confirmation, which I always advise juries to require, is a *confirmation of some fact which goes to fix the guilt upon the particular person charged*. You may legally convict on the evidence of an accomplice only, if you can safely rely upon his testimony; but I advise juries never to act on the evidence of an accomplice unless he is confirmed as to the particular prisoner who is charged with the offence.

Upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, one a large, the other a small one, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid; on the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen; and the skins were found in the place named by the accomplice. Patteson, J., 'If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient. For example, the finding the skins at the place at which the accomplice said they were would have been no confirmation of the evidence against the prisoner, because the accomplice might have put the skins there himself. But here we have a great deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury.' (e)

Where the principal witness against two prisoners was an accomplice who was supported by other evidence in his statement

The corroboration ought to affect the identity of the party accused, and connect him with the crime charged.

Finding mutton in the prisoner's house corresponding in size with that which was lost.

Corroboration as to one prisoner is in-

(b) *Reg. v. Dyke*, 8 C. & P. 261.

(d) *Reg. v. Farler*, MSS. C. S. G. 8 C. & P. 106, *et per* Abinger, C. B., 'Now, in my opinion, corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly;

that he had described how the person did put the knife to the throat, and did steal the property; it would not at all tend to show that the party accused participated in it.' See *Rex v. Addis*, 6 C. & P. 388. *Kelsey's case*, 2 Lew. 45, *Patteson, J.*

(e) *Reg. v. Birkett*, 8 C. & P. 732. The prisoner was acquitted. Assuming that the confirmation in this case showed the prisoner to have been connected with the transaction, the fact of his being the receiver and not the principal seems to have been wholly uncorroborated.

sufficient  
against an-  
other.

The proper course where there is only one prisoner is to advise the jury not to convict him unless the evidence of the accomplice be confirmed, not merely as to the circumstances of the offence, but also as to the participation of the prisoner in it; and where there are several prisoners, the proper course is to advise the jury not to convict any one, with respect to whom there is no such corroboration, although there may be such corroboration as to the others.

against one of the prisoners, but not against the other; Alderson, B., told the jury that 'where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to me that it would be unjust to give it a general effect.' (f)

Where Stubbs, Wardle, and Wraithman were indicted for larceny of copper, and three accomplices were examined, but their evidence was not corroborated as to Stubbs, but only as to the other prisoners, it was urged on behalf of Stubbs that the jury ought to be directed that the evidence of the accomplices ought to have been corroborated as to Stubbs; but the chairman directed the jury that it was not necessary that the accomplices should be corroborated as to each individual prisoner; that their being corroborated as to material facts tending to show that the other prisoners were connected with the larceny was sufficient as to the whole case, but that the jury should look with more suspicion at the evidence in Stubbs' case, where there was no corroboration, but that it was a question for the jury; and upon a case reserved upon the question whether this direction was right, Jervis, C. J., said, 'We cannot interfere in this case, although we may regret the result that has been arrived at. It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge, and require confirmation. There is a further point in this case. Where an accomplice speaks as to the guilt of three prisoners, and is confirmed as to two of them only, the jury may no doubt, if they please, act on the evidence of the accomplice alone as to the third prisoner; but it is proper for the judge in such case to advise the jury that it is safer to require confirmation as to the third prisoner, and not to act on the accomplice's evidence alone; for nothing is so easy as for the accomplice, speaking truly as to all the other facts of the case, to put the third man in his own place; but a jury may, if they choose, act on the unconfirmed testimony of an accomplice: in this case they have acted on the evidence before them, and we cannot interfere.' Parke, B., 'During the time I have been on the bench, now more than a quarter of a century, I have uniformly laid down the rule of practice as it has been stated by the Lord Chief Justice. I have told the jury that it was competent for them to find a prisoner guilty upon the unsupported testimony of an accomplice, but that great caution should be exercised, and I have advised them, and juries have acted on that advice, not to find a prisoner guilty on such testimony unless it was confirmed. There has been a difference of opinion as to what corroboration is requisite, but my practice has always been to direct the jury not to convict unless the evidence of the accom-



plice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner. An accomplice necessarily knows all the facts of the case, and his story, when the question of identity is raised, does not receive any support from its consistency with these facts. The chairman in this case has departed from the usual practice, but the jury having acted upon the evidence, the secretary of state can only interfere.' Cresswell, J., 'I agree in the view of the question taken by my brother Parke, and have always acted upon it. You may take it for granted that the accomplice was present when the offence was committed, and there may therefore be no difficulty in corroborating him as to the facts, but that has no tendency to show that any particular person who may be accused was there.' (g)

Where on an information for bribery which contained eight counts, each charging a distinct act of bribing different voters, it appeared that the witnesses went successively into a house, and into a back room, in which the defendant was seated, and after an interview with the defendant each of them passed into another room in which another person was seated, from whom each received the several sums mentioned in the several counts of the information, and then passed into the street and to the hustings and voted; it was objected that there was no corroborative evidence of each of the witnesses, and that the jury ought to be directed not to act upon the evidence of each of the witnesses, but to acquit the defendant. Martin, B., however, left the case to the jury as follows: 'Assume, for the purposes of the present discussion, that this man was speaking the truth. Is there any *law* which prohibits a jury from believing a man who (it must be assumed for the sake of argument) spoke the truth, simply because he is not corroborated? I know of none. I know of *no rule of law* myself, but there is a *rule of practice* which has become so hallowed as to be deserving of respect; I believe these are the very words of Lord Abinger—it deserves to have all the reverence of the law. (h) This case is distinguishable from *Reg. v. Stubbs*, for they were there accessories properly so called, and all the persons were concerned in the same offence in which they came to give evidence; in this particular case it is not so, because all of these cases are separately gone into, and it is not one and the same offence; and if you think that all these witnesses have spoken the truth, then it is clear that each case is separate; each person giving money is a distinct offence. I own I think also that this is a very important point, and that it may be very doubtful whether or not the evidence in this case will be found to be of that corroborative character which the law requires.' (i) The jury found a verdict of guilty on one count only; and on a motion for a new trial, the court held that the direction to the jury was right, even supposing the witnesses could be considered as accomplices of the defendant. The law on this subject was correctly laid down in *Reg. v. Stubbs*. It is not a rule of law that an accomplice must be corroborated in order to render a conviction valid, but it is a rule of general and usual practice to advise juries not to convict on the evidence of an accomplice *alone*. The

Corroboration in a case of bribery by several persons separately bribed.

(g) *Reg. v. Stubbs*, Dears. C. C. 555. the report in 5 Law T. R. 147, where it

(h) See *Reg. v. Farler*, ante, p. 595. is much better given than in the report

(i) This summing up is taken from in 1 B. & S. 311.

application of that rule, however, is matter for the discretion of the judge by whom the case is tried. Moreover, in this case the court thought there was corroborative evidence. It was not necessary that there should be corroborative evidence as to the very fact; it is enough if there be such as to confirm the jury in the belief that the accomplice is speaking the truth. (*j*)

Of the nature  
of the con-  
firmation.

Where it was strongly contended that two accomplices had not been corroborated; Maule, J., said, 'Confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary. If, for instance, a burglary had been committed, and an accomplice gave evidence that a person charged was present when it was effected; if that person had been seen hovering about the premises some time before, or was seen in possession of some of the stolen property shortly after, that might be reasonable confirmation of the statement that the prisoner helped to commit the crime.' (*k*)

Confirmation  
by the wife of  
an accomplice.

Upon an indictment for stealing a sheet it appeared that the sheet was found in the house of the accomplice, who gave evidence to prove that the prisoners stole the sheet, and the wife of the accomplice was the only person to confirm the accomplice's statement; Park, J. A. J., 'Confirmation by the wife is, in a case like this, really no confirmation at all. The wife and the accomplice must be taken as one for this purpose. The prisoners must be acquitted.' (*l*)

Confirmation  
as to principal,  
but none as to  
the receiver.

Where a principal and receiver are jointly indicted, and an accomplice is confirmed as against the principal, but not as against the receiver, this is not sufficient to support the case against the receiver.' (*m*)

Confirmation  
as to receivers,  
but none as to  
principal.

One prisoner was indicted for stealing, and two other prisoners for receiving, several pairs of shoes, knowing them to have been stolen, and the only witness to prove the felony was an accomplice, and she also proved the case against the receivers; she was confirmed as to the latter, but there was no confirmation whatever as to her testimony against the principal; it was objected that even as to the receivers the confirmation was not sufficient in itself; but if it was, it would still be necessary to confirm the witness as against the principal; for if the case failed against her, the receivers would be entitled to an acquittal. Littledale, J., 'The confirmation as to the receivers is slight; but as there is no con-

(*j*) Reg. v. Boyes, 1 B. & S. 311. As to the distinction taken between Reg. v. Stubbs and this case, it seems to make no difference. If a man is charged with several offences in the same indictment, the evidence to prove each ought to be the same as if each were the subject of a separate indictment. In this case each act of bribery appears to have been proved by the party bribed alone; there, therefore, was no corroboration at all as to any one act of bribery. Suppose a servant were indicted for three larcenies from his master within six months, and three receivers gave evidence against him, but they were the only witnesses, it seems clear the case ought wholly to fail for want of any corroboration. See Reg.

v. Pratt, 4 F. & F. 315. C. S. G.

(*k*) Reg. v. Mullins, 3 Cox, C. C. 526. Wightman, J., was present.

(*l*) Rex v. Neal, 7 C. & P. 168. Mr. Phillipp, vol. 1, p. 33, observes, that in this case 'the circumstances of the case might have been such as to warrant this decision. But it may often happen that the evidence of the wife is so free from all suspicion, so independent of the evidence of the husband, so manifestly unconcerned and uncontrived, and so undesignedly corroborative of his evidence, that it might be proper not to consider the accomplice and his wife as one, but to act upon her evidence as sufficient confirmation.'

(*m*) Rex v. Moores, 7 C. & P. 270.

firmation against the principal felon, I think the case fails altogether; there ought to be confirmation on that point before the jury can be asked to believe the witness's testimony.' (n)

So where on an indictment against a prisoner for receiving stolen oats, a quantity of oats were found on the prisoner's premises, which the prosecutor believed to be his, but could not positively identify them, as they were mixed with peas, and the only other evidence was that of the thief, who had pleaded guilty; Pollock, C. B., advised the jury to acquit the prisoner, it being perilous to convict a person as receiver on the sole evidence of the thief. This would put it in the power of a thief, from malice or revenge, to lay a crime on any one against whom he had a grudge. And here there was no adequate confirmation of the thief's evidence. (o)

The thief a witness against the receiver.

The practice of requiring confirmation where the case for the prosecution is supported by one accomplice, applies equally when two or more accomplices are brought forward against a prisoner. (p)

Where there are several accomplices

A married woman who consents to her husband committing an unnatural offence with her is an accomplice in the felony, and as such her evidence requires confirmation. (q) And the same would be the case if the party with whom the offence was committed was a male, and consented. (r)

Unnatural offence.

Although all persons who are present aiding and assisting at a prize fight are in point of law principals in the second degree in manslaughter if death ensues, yet they have been holden not to be such accomplices as to require any evidence to confirm their testimony. (s)

Cases where confirmation is not required.

Where upon an indictment against two prisoners for maliciously shooting, and against a third as an accessory after the fact, a person proved that he had been employed by the accessory to remove the principals out of the way, and for this he had received money, and had hidden the principals in an outhouse, and there was no corroboration by any other witness as to these facts; and it was contended that as the witness was an accomplice he ought to be corroborated; Gurney, B., observed, in summing up, that 'with regard to the necessity of confirming an accomplice much might depend upon the nature of the crime in question: it was for the jury to consider whether there was anything in the witness's conduct to warrant their disbelieving him.' (t)

(n) *Rex v. Wells*, M. & M. 326. All the prisoners were acquitted. It is not stated what the form of the indictment was, but it is conceived it must have alleged the receipt to be of the shoes 'so stolen as aforesaid,' so that an acquittal of the principal necessarily caused an acquittal of the receivers. See *Rex v. Woolford*, 1 M. & Rob. 334, vol. 2, p. 484. If there had been counts charging the receivers with a substantive felony, there seems no reason why the receivers might not have been convicted, though the principal was acquitted. See vol. 2, p. 487, and *Rex v. Field*, *post*, p. 610. C. S. G.

(o) *Reg. v. Robinson*, 4 F. & F. 43.

*R. v. Pratt*, 4 F. & F. 315.

(p) 1 Phill. Ev. 33. *Reg. v. Stubbs*, Dears. C. C. 555, *ante*, p. 607. *Rex v. Noakes*, 5 C. & P. 326, *cor.* Littledale, J., Bolland, B., and Alderson, J.

(q) *Reg. v. Jellyman*, 8 C. & P. 604.

(r) *Per Patteson, J.*, *ibid.*

(s) *Rex v. Hargrave*, 5 C. & P. 170, *Patteson, J.* *R. v. Young*, 10 Cox, C. C. 371, a case of a sparring match, which *Braunwell, B.*, thought was not illegal.

(t) *Rex v. Jarvis*, 2 M. & Rob. 40. In *Rex v. Durham*, 1 Leach, 478, where a receiver was admitted as a witness against some burglars, and was uncorroborated, the court observed that the receiver was to be considered rather as an accessory

Where the accomplice has been summarily convicted.

A spy.

In cases of misdemeanor.

Whether confirmation sufficient, for jury.

The jury may convict some and acquit others upon the evidence of the same accomplice.

Accomplice evidence for prisoner.

Acquittal to become a witness.

It has been holden that the fact of a party having been summarily convicted for poaching in the night under the 9 Geo. 4, c. 69, s. 1, does not dispense with the necessity of producing confirmatory evidence of his testimony when produced as a witness against his companions upon an indictment, under the 9th section of the same statute, founded upon the same transaction. (*u*)

Where on an indictment against certain Chartists under the 11 & 12 Vict. c. 12, two witnesses admitted that they joined the conspirators simply for the purpose of betraying them, and each did so without the knowledge of the other, but both had been as active as any of the conspirators, endeavouring to persuade strangers to join them, and urging those who were members to deeds of violence: it was held that there was no rule of law which declared that their evidence required confirmation, nor any rule of practice which said that juries ought not to believe them. A spy may be an honest man; he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and, if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, there is no impropriety in his taking upon himself the character of informer. The government are justified in employing spies, and a person so employed does not deserve to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished in fact and in principle from accomplices. (*v*)

The case of *Reg. v. Farler* (*w*) is an authority that the practice requiring confirmation of an accomplice extends to misdemeanors.

Whether the evidence brought forward to confirm the accomplice is a satisfactory and sufficient confirmation is a question which the jury are to determine. (*x*)

In a case of great importance where an accomplice swearing positively to several prisoners was confirmed as to some and not confirmed as to others; Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed. (*y*)

An accomplice is a competent witness for his associates as well as against them, even when they are severally indicted for the same offence, whether he is convicted or not. (*z*) Where there is not any or very slight evidence against one of several prisoners indicted and tried together, the court will sometimes direct the jury to give their verdict as to him, and upon their acquittal of him admit

after the fact than as an accomplice in the facts; but this distinction seems never to have been acted upon in any case, and the case in which it was taken was decided on the authority of *Rex v. Atwood*, *ante*, p. 603, on the ground that the circumstance of his being an accomplice went to his credit only, and that his evidence might be left to the jury, although it was entirely uncorroborated. See *Reg. v. Robinson*, *ante*, p. 609, note (*o*). (*u*) *Reg. v. Farler*, 8 C. & P. 106, *ante*, p. 605.

(*v*) *Reg. v. Muldoon*, 11 C. & P. 520.

Maule, J., and Wightman, J.

(*w*) *Supra*, note (*u*). And see *Reg. v. Boyes*, 1 B. & S. 311. *Ante*, p. 608. But see per Gibbs, Attorney-General, in *Rex v. Jones*, 31 How. St. Tr. 315.

(*x*) 1 Phill. Ev. 38.

(*y*) *Rex v. Field*, Dick. Q. S. 520. See per Alderson, B., in *Rex v. Wilkes*, 7 C. & P. 272.

(*z*) 2 Stark. Ev. 13. 2 Hale, P. C. 280, citing the case of Bilmore, Gray, and Harbin, 2 Roll. Abr. 685, pl. 3. Bath and Montague's case, cited in *Lock v. Barton*, Fortesc. 246.

his testimony for the others. (a) In a case where one of the defendants on an indictment for an assault submitted and was fined, and paid the fine; Pratt, C. J., allowed him to be a witness for the other, considering the trial at an end with respect to him. (b) Where one of two prisoners charged with housebreaking pleaded guilty; Coltman, J., held that this prisoner might be called as a witness by the other prisoner to prove that he was not present at the committing of the offence; (c) and in another case Erle, J., allowed a prisoner who pleaded guilty to an indictment for uttering a forged note, and against whom a previous conviction was proved, to be called as a witness for another prisoner; but he was previously sentenced, which Erle, J., considered to be the proper course. (d)

## SEC. VII.

### *What Witnesses are Competent.*

By the competency of a witness is meant his admissibility to give evidence; if he is incompetent (of which the court is to judge) (e) he is to be totally excluded from giving his testimony; if he is competent, it will then be for the jury to decide whether his evidence, when given, is entitled to credit.

Of the competency of witnesses.

All persons are admissible witnesses who have the use of their reason, and such religious belief as to feel the obligation of an oath, and who are not disqualified in the manner hereafter mentioned. (f) The causes of incompetency, therefore, to be considered are—1. Defect of understanding. 2. Defect of religious belief. 3. Disqualification and therewith of the incompetency of husband and wife.

1. Persons incompetent from want of understanding. Idiots (g) are not admissible to give evidence. By the word 'idiot' is meant a fool or madman from his nativity, who never has any lucid intervals. (h) A person deaf and dumb from his nativity (though in presumption of law an idiot), (i) if he is capable of conversing by signs, and has a proper sense of the obligation of an oath, may be admitted as a witness and examined with the assistance of an interpreter. (j) But however intelligent and capable of communicating and receiving information by signs he may be, he cannot be admitted as a witness if it does not appear that he clearly understands the nature of an oath. (k) So lunatics are incompetent; that is, persons usually mad, but if they have intervals of reason (l) they are competent during those times. (m) And in such cases it is for the judge to determine whether the insane person has the sense of religion in his mind, and whether he understands the

Want of understanding.  
Idiots.  
Deaf and dumb.

(a) 2 Hawk. P. C. c. 46, s. 98. *Rex v. Bedder*, 1 Sid. 237. 2 Stark. Ev. 13.

(b) *Rex v. Fletcher*, 1 Str. 633. *Rex v. Sherman*, Cas. temp. Hardw. 303. 1 Phill. Ev. 68.

(c) *Reg. v. George, C. & M.* 111. See *Rex v. Lafone and others*, 5 Esp. N. P. C. 155. 1 Phill. Ev. 68.

(d) *Reg. v. Jackson*, 6 Cox, C. C. 525. See *post*, p. 620.

(e) 2 Hale, P. C. 277.

(f) Per Lawrence, J., in *Jordaine v. Lashbrooke*, 7 T. R. 610.

(g) Com. Dig. Testmoign, A. 1.

(h) See vol. 1, p. 113.

(i) *Ibid*.

(j) *Ruston's case*, 1 Leach, C. C. 408.

(k) *Reg. v. O'Brien*, 1 Cox, C. C. 185, Jackson, J.

(l) Vol. 1, p. 114.

(m) Com. Dig. Testmoign, A. 1.

nature and the sanction of an oath, and then the jury are to decide on the credibility and the weight of his evidence. (*n*)

Children.

With respect to children, the rule now seems to be that their competency does not depend on their age, but that a child of any age may be examined, if capable of distinguishing between good and evil; (*o*) but whatever be its age, it cannot be examined without being sworn. (*p*) Whether the infant be competent or not is a question for the discretion of the court. (*q*) Before a child is examined the judge must be satisfied that the child feels the binding obligation of an oath from the general course of its religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to it for the purposes of a trial. Where, therefore, on an indictment for murder it appeared that, previous to the happening of the circumstances, to which a child came to speak, she had had no religious education whatever, and had never heard of a future state, and she had been twice visited by a clergyman who had given her some instruction as to the nature and obligation of an oath, but she had no intelligence as to religion or a future state at the time of trial; her testimony was rejected. (*r*) There is no difference in respect of the competency of children between capital cases and misdemeanors. (*rr*)

Postponing the trial in order that a child may be instructed.

Where the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary for the purposes of justice to put off the trial of a prisoner, directing that the child in the meantime should be properly instructed. (*s*)

Where a criminal prosecution was coming on to be tried, and the learned Judge found that the principal witness was a female infant, wholly incompetent to take an oath, he postponed the trial till the following assizes; and ordered the child to be instructed in the meantime, by a clergyman, in the principles of her duty, and the nature and obligation of an oath. (*t*) And at the next assizes the

(*n*) Reg. v. Hill, 2 Den. C. C. 254. See this case, *post*, p. 629.

(*o*) By such capability must be understood a belief in God, or in a future state of rewards and punishments; from which the court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood, *ibid*. See White's case, 1 Leach, 430, 431. 'It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge would allow him to be sworn.' Per Alderson, B., Reg. v. Perkins, 2 Moo. C. C. R. 135. As to the rule in former times, see R. v. Travers, 1 Str. 700. R. v. Dannel, 1 East, P. C. c. 10, s. 5, pp. 443, 444; 1 Hale, 302; 2 Hale, 278.

(*p*) Brazier's case, Reading Spring Ass. 1779. 1 East, P. C. c. 10, s. 5, pp. 443, 444. 1 Leach, 199, S. C. Powell's case, 1 Leach, 110. Bull. N. P. 293.

(*q*) 1 Stark. Ev. 94.

(*r*) Rex v. Williams, 11 Mod. 151.

Patteson, J. In Reg. v. Holmes, 2 F. & F. 788, Wightman, J., seems to have thought it sufficient to allow a child of six years old to be sworn, that to the question, 'Is it a good or bad thing to tell a lie?' the child answered, 'A bad thing.' But the following questions and answers were also put and given: 'Do you say your prayers?' 'Yes.' 'What becomes of a person who tells lies?' 'If he tells lies he will go to the wicked fire;' and the child was then sworn. And Wightman, J., admitted a child of about the same age, who answered the question, 'Is it a good or bad thing to tell a lie?' by saying it was a bad thing. Anonymous in the note, *ibid*.

(*rr*) Rex v. Travers, 2 Stra. 700.

(*s*) 1 Phill. Ev. 5. But this must not be done in order that an *adult* may become capable, *ibid.*, *post*, p. 616.

(*t*) Anon. cor. Rooke, J., at Gloucester, Mr. J. Rooke mentioned the case on a trial at the Old Bailey, in 1795; and added, that upon a conference with the

prisoner was put upon his trial, and the infant, being found by the Court on examination to have a proper sense of the nature of an oath, was sworn; and the prisoner was convicted upon her testimony, and executed. (u) And where a bill was preferred against a prisoner for carnally knowing a girl under ten years of age, and the girl, being examined by Erle, J., before going before the grand jury, appeared to have no notion of religious or moral duties, and therefore was not sworn, and the bill was ignored in consequence; Erle, J., on the authority of the preceding case, directed the prisoner to be detained till the next assizes, and that the girl in the meantime should be duly instructed. (v)

It is entirely in the discretion of the court whether the trial should be postponed for this purpose or not: and where the want of understanding the nature and obligation of an oath arose from no neglect, but from the child being only six years old, and therefore being too young to have been taught; Pollock, C. B., refused to postpone the trial, as he doubted whether the loss in point of memory would not more than countervail the gain in point of religious education. (w) But an application to postpone the trial on this ground ought properly to be made before the child is examined by the grand jury, or, at all events, before the trial has commenced; for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the judge cannot discharge the jury, but should, if there is no other evidence of the offence having been committed, direct an acquittal. (x)

When the child is incompetent to be sworn, the account which it has given of the transaction to others is inadmissible. (y)

2. Of incompetency from defect of religious belief. The rule as now settled appears to be, that as far as regards this kind of incompetency, infidels of this and all other countries, who yet believe in a God, the avenger of falsehood, are admissible as witnesses, and the only persons incompetent are those who do not believe in a God, the dispenser of future rewards and punishments; (z) and it should seem that it makes no difference whether the belief is that such dispensation is to take place in a present or in a future state of existence. 'Such infidels,' says Lord C. J. Willes, in the

Defect of religious belief.

other Judges, on his return from the circuit, they unanimously approved of what he had done. See note (a) to White's case, 1 Leach, 430; and 2 Bac. Abr. 577, in the notes.

(u) *Id. ibid.*

(v) *Reg. v. Baylis*, 4 Cox, C. C. 23. In *Rex v. Williams*, 7 C. & P. 320, where on a trial for murder, a child of eight years of age had been visited twice by a clergyman, who had given her some instruction as to the nature of an oath; Patteson, J., said, 'I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, and communicated to her for the purposes of

this trial.'

(w) *Reg. v. Nicholas*, 2 C. & K. 246. Pollock, C. B., observed that he could easily conceive that there might be cases where the intellect of the child was much more ripened, as in the cases of children of nine, ten, or twelve years old, where their education had been so utterly neglected that they were wholly ignorant on religious subjects; and in these cases a postponement of the trial might be very proper.

(x) 1 Phill. Ev. 5, citing *Rex v. Wade*, *post*, p. 616.

(y) *Reg. v. Nicholas*, 2 C. & K. 246. 1 Phill. Ev. 5.

(z) 1 Phill. Ev. 10. As to a person objected to as incompetent to take an oath making a promise and declaration, see 12 & 13 Vict. c. 48, s. 4, *ante*, p. 27.

case of *Omichund and Barker*, (a) 'who either do not believe a God, or, if they do, do not think that He will either reward or punish them *in this world or in the next*, cannot be witnesses in any case, nor under any circumstances—for this plain reason, because an oath cannot possibly be any tie or obligation to them.'

Where a plaintiff being called as a witness was sworn on the *voire dire*, and was questioned and answered as follows:—'Do you believe in a God?'—'I do not.' 'Do you believe in the obligation of an oath?'—'I believe my word is my bond.' 'Do you believe that there is an obligation attached to the oath?'—'I do not believe in an obligation of an oath any more than on that of my word.' 'Do you believe in a future state of rewards and punishments?'—'I do not.' 'Do you believe that you are bound to speak the truth?'—'I do.' 'Do you believe you are responsible if you tell a falsehood?'—'I do, to my fellow men and to my own conscience.' 'Do you believe in a moral obligation to speak the truth?'—'I do.' 'Do you believe that you are morally bound to speak the truth by the solemn declaration you have taken?'—'I do.' It was held that the judge rightly refused to permit her to be examined. (b)

Method of  
administering  
the oath.

The proper method, however, of administering the oath must vary according to that which the proposed witness himself considers most obligatory; (c) for, 'as the purpose is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most.' (d) Therefore, a Mahometan should be sworn on the Alcoran; (e) a Jew on the Pentateuch, with his head covered (f) a Gentoo according to his peculiar forms. (g) So a witness professing Christianity, but declining to swear on the New Testament, was allowed to be sworn on the Old Testament, upon stating that he should consider such oath binding on his conscience. (h) By the law of Denmark an oath is taken in all judicial proceedings by holding up three fingers of the right hand, to indicate the three persons of the Holy Trinity, and promising to speak the truth. (i) But although it is highly

(a) Willes's Rep. 549.

(b) *Madan v. Catanach*, 7 H. & N. 360.

(c) Willes's Rep. 549.

(d) By Lord Mansfield in *Atcheson v. Everitt*, Cowp. 389. And see *Miller v. Salomons*, 7 Exch. R. 475.

(e) *Morgan's case*, 1 Leach, 54.

(f) *Omichund v. Barker*, Willes, 543. 1 Phill. Ev. 9.

(g) 1 Phill. Ev. 9. 1 Chit. Crim. L. 591.

(h) *Edmonds v. Rowe*, R. & M. N. P. R. 77. *Bosanquet*, Serjt.

(i) *Boelen v. Melladew*, 10 C. & B. 898. The first instance in which an oath is mentioned in the Bible is Gen. 14, v. 22, which ought to be translated, 'I have lifted up my hand to Jehovah;' but the like expression occurs frequently afterwards in the original, though sometimes it is otherwise translated in our version. Mr. Greaves, in the 4th edition of this work, remarks that 'A very remarkable distinction exists between the manner in which English and Scotch witnesses

now-a-days take the book at the time when they are sworn. An English witness always places his fingers under, and his thumb at the top of the book. A Welsh witness, on the contrary, places his three fingers at the top, and his thumb under the book, whilst his little finger does not touch the book at all. And I have often observed witnesses in the box let the book remain on the top of the box with their three fingers upon the book until the time to kiss it arrived, when they raised it from the box to their lips. Now no doubt this practice originated from the ancient form of taking the oath with the hand raised in the manner above described, and which, in process of time, was changed first to laying the three fingers upon the book, and so taking the oath, and afterwards to raising the book and kissing it. There is no doubt that originally an oath was taken without touching anything; and Selden, vol. 2, p. 1467, plainly shows that such was the custom among the early Christians, but he also shows that



desirable that a witness should be sworn according to the form which he considers *most* binding on himself, yet, if he has taken the oath in the usual form administered in our courts of law, without objecting to it, and upon being questioned whether he considers the oath he has taken as binding on his conscience, he answers in the affirmative, he cannot then be further asked whether there be any other mode of swearing more binding on his conscience than that he has already used. (*j*) For if the witness says he considers the oath as binding on his conscience, he does, in effect, affirm that in taking that oath he has called his God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance on his head if what he shall afterwards say is false, and, having done that, it is perfectly unnecessary and irrelevant to ask any further questions. (*k*) And so where a negro, who was called as a witness, stated before he was sworn that he was a Christian and had been baptized, it was held that he ought to be sworn without any other question being asked. (*l*)

The intercourse of nations must frequently give rise to the necessity of the sanction of an oath in matters that concern both; sometimes with reference to treaties into which they may enter, sometimes with reference to the administration of criminal or civil justice: the sanction of an oath, if valid at the place where taken, ought to be considered valid everywhere; just as marriage valid at the place where celebrated is (generally speaking) valid everywhere else; and as an oath is the personal act of the party taking it, if a witness be in a foreign land, his oath ought to be received as it would be received in his own country. In fact, a judicial oath (for justice is of all countries and climes) is governed by the law of nations; but an oath of office or of qualification is governed by the municipal laws of the state which requires it to be taken, and by those laws alone. (*m*) And in the case of oaths of office or of qualification, where the very form of the oath as well as the oath itself is prescribed by the legislature, there the directions of the legislature must be literally followed, and the oath must, and can only lawfully, be taken in the prescribed form, until that form be altered by the same authority which appointed it. (*n*)

The 1 & 2 Vict. c. 105, enacts, that 'in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath

Judicial oaths are governed by the law of nations, oaths of office or of qualification by the municipal law.

A person bound by an oath administered in such form as he may declare to be binding.

the custom of touching the book was derived from the Pagans.' See 3 Inst. 165. Jacob's Law D. (Oath). 2 Hale, P. C. 279. *Colt v. Dutton*, 2 Sid. R. 6. More information on the subject of oaths may be found in *Notes and Queries*, vol. 8, p. 364, 471, 605; vol. 9, p. 45, 61, 403; vol. 10, p. 271; vol. 11, p. 232 (1st Ser.); and vol. 2, p. 293 (3rd Ser.).

(*j*) The Queen's case, 2 B. & B. 285.  
(*k*) Ibid. See also *Sells v. Hoare*, 3 B. & B. 232, where, on an application for a new trial, it appeared that a witness who had been sworn as a Christian,

on the Gospels, was a Jew; and the court refused to grant a rule, being unanimously of opinion that the oath as taken was binding on the witness both as a moral and religious obligation: and Richardson, J., observed, that if the witness had sworn falsely, he might be convicted of perjury under the oath he had taken.

(*l*) Reg. v. Serva, 2 C. & K. 58. Platt, B.

(*m*) Per Pollock, C. B. *Miller v. Salemons*, 7 Exch. R. 475.

(*n*) Per Alderson, B. Ibid.

administered : provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.\*

Proper mode of examination to try witness's competency.

The proper method of examining a witness, if the examination tends merely to try his *competency* in respect to religious principle, is not to question him as to his particular opinions (as whether he believes in Jesus Christ), but to inquire whether he believes in the existence of a God, the obligation of an oath, and a future state of rewards and punishments: (o) but if the examination be previous to swearing the witness, for the purpose of ascertaining what form of administering the oath will be most proper, as most binding on the witness's conscience, it is said to be not irregular to examine him as to his opinions; as whether he believes in the Gospels on which he is about to be sworn. (p) If a material witness, who is an adult, and of sufficient intellect, has no idea of a future state of rewards and punishments, it is not proper to discharge the jury, and postpone the trial, in order that the witness may have an opportunity of being instructed upon that subject before the next assizes, as may be done in the case of a child. (q)

Trial cannot be postponed until an adult is instructed.

Quakers and Moravians.

Quakers were formerly excluded from giving evidence, not indeed from defect of religious principle, but owing to their refusal, upon religious scruples, to take any oath at all. (r) But this disability is now entirely removed. The statutes upon this subject are noticed *ante*, p. 26.

3 & 4 Will. 4, c. 82. Separatists.

The 3 & 4 Will. 4, c. 82, reciting, that 'there are in various places in Ireland, and in some parts of England and elsewhere, certain dissenters from the United Church of England and Ireland, and from the Church of Scotland, commonly called Separatists,' enacts, that 'every person for the time being belonging to the said sect called Separatists, who shall be required upon any lawful occasion to take an oath in any case where by law an oath is or may be required, shall, instead of the usual form, be permitted to make his or her solemn affirmation or declaration in these words following, viz:—'I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare.' Which said solemn affirmation

(o) *Rex v. Taylor, Peake, N. P. C. 11*, by Buller, J., 1 Phill. Ev. 11; and according to the judgment of Willes, C. J., in *Omichund v. Barker, Willes, 541, ante*, p. 614, it seems sufficient if the witness believes in such a state either in this world or the next.

(p) 1 Phill. Ev. 11.

(q) *Rex v. Wade, R. & M. C. C. R. 86. R. v. Whitehead, 10 Cox, C. C. 234.*

(r) Their solemn affirmation, by the 7 & 8 Will. 3, c. 34, 8 Geo. 1, c. 6, and 26 Geo. 2, c. 46, s. 36, was admitted in courts of justice to have the same effect

as an oath in all civil, but not in criminal cases. It was, however, receivable in cases which are only technically criminal, as in penal actions, *Atcheson v. Everett, Cowp. 382*, but excluded in all proceedings substantially criminal, as on a motion for an information for a misdemeanor. *Rex v. Wych, 2 Str. 872. Rex v. Gardner, 2 Burr. 1117.* But where the application to the court was against a Quaker, his affirmation might be received in his own defence, though the proceedings were of a criminal nature. *Rex v. Gardner, supra.*

or declaration shall be adjudged and taken, and is hereby enacted and declared to be of the same force and effect, to all intents and purposes, in all courts of justice and other places whatsoever, where by law an oath is or may be required, as if such Separatists had taken an oath in the usual form.'

As to persons refusing from conscientious motives to be sworn, or being incompetent to take an oath, being allowed to affirm or declare, see 24 & 25 Vict. c. 66, s. 1, (t) and 32 & 33 Vict. c. 68, s. 4, *ante*, p. 27.

By the 14 & 15 Vict. c. 99, s. 16, 'every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.'

By the 13 & 14 Vict. c. 21, s. 4, in all Acts of Parliament 'the words "oath," "swear," and "affidavit," shall include affirmation, declaration, affirming and declaring, in the case of persons by law allowed to affirm instead of swearing.'

Where an oath is administered before a court, judge, or magistrate, by a crier, clerk, or other person, the oath is in point of law administered by the court, judge, or magistrate: for the person who actually administers the oath is the agent of the court, judge, or magistrate, and when he administers the oath, the court, judge, or magistrate administers it. (u)

A witness who is subpœnaed cannot object to be sworn on the ground that any questions which may be put to him would tend to criminate him; but he must be sworn, and must either answer the questions, or object to answer them, if he insists on any privilege in that respect. (v)

3. Disqualification, &c. Previous to the 53 Geo. 3, c. 127, there was great doubt whether persons excommunicated by the ecclesiastical courts were competent witnesses; (w) but by that statute excommunication is not to be pronounced except in certain cases;

Court, &c., may administer oaths.

Oath includes affirmation.

Oath administered in the presence of the court.

A witness cannot refuse to be sworn, because any questions may criminate him.

Excommunicated persons.

(t) By 30 & 31 Vict. c. 35, s. 8, and whereas relief has been given by the statute 24 & 25 Vict. c. 66, to 'persons refusing, from alleged conscientious motives, to be sworn as witnesses in criminal proceedings, and it is expedient to extend that relief to persons required to serve as jurors: ' Therefore, if any person summoned or required to serve as a juror in any civil or criminal proceeding, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge or other presiding officer or person qualified to administer an oath to a juror, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following:

'I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare, &c. Which solemn affirmation and de-

claration shall be of the same force and effect, and if untrue shall entail all the same consequences, as if such person had taken an oath in the usual form; and whenever in any legal proceedings it is necessary or usual to state or allege that jurors have been sworn, it shall not be necessary to specify that any particular juror has made affirmation or declaration instead of oath, but it shall be sufficient to state or allege that the jurors have been "sworn or affirmed."

(u) Reg. v. Tew, Dears. C. C. 429, where an objection that the oath was administered to the witnesses going before the grand jury by the crier in open court, whereas it ought to have been administered by the Clerk of the Peace, was held to be unfounded, frivolous, and discreditable. See the 19 & 20 Vict. c. 54, as to the grand jury swearing the witnesses.

(v) Boyle v. Wiseman, 10 Exch. R. 647.

(w) 10 Geo. 3, c. 127.

and by sec. 3, in those cases, parties excommunicated shall incur no civil disabilities.

6 & 7 Vict.  
c. 85. Wit-  
nesses not to  
be excluded  
from giving  
evidence by  
incapacity  
from crime or  
interest.

The 6 & 7 Vict. c. 85, s. 1, reciting that 'the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony,' enacts 'that no person offered as a witness shall hereafter be excluded *by reason of incapacity from crime (x) or interest (y)* from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law or by consent of parties authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, (z) or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence.' (a).

In one case since this Act Mr. Justice Lush said he considered a person under sentence of death was not a competent witness, but, if it became necessary, he would reserve the point. (b)

Where upon an indictment for felony two prisoners, who had pleaded guilty to the same indictment, were called as witnesses on the part of the Crown, and they had been previously convicted and sentenced for another and different offence; it was urged that they were incompetent, as they were incapable, as attainted felons, of being witnesses at common law, and as they were 'individually named upon the record' their competency was not

(x) Before this Act if a person had been convicted of certain offences, he was incompetent to give evidence. But in order to exclude a person from being a witness on this account, it was necessary to produce the record, not only of his conviction, but of the judgment thereon. *Gilb. Ev.* 128. *Com. Dig. Testm. A. 5.* Outlawry in a personal action did not make a person incompetent as a witness. *Co. Litt. 6 b.*; *Com. Dig. Testm. A. 5.*

(y) Before this Act persons having an interest in the event of a suit, were excluded from being witnesses in favour of that party to which their interest inclined them. As to the nature of the interest that excluded, see 1 *Phill. Ev.* 1 *Stark. Ev. Smith v. Prager*, 7 *T. R.* 60. But no relationship, except that of husband and wife, created a disqualifying interest. (z) *See*—plainly a mistake for 'inquiry.'

(a) The clause

vided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively.' But the whole of this proviso, except so much as relates to husbands and wives, was repealed by the 14 & 15 Vict. c. 99, s. 1, and the remainder by the 16 & 17 Vict. c. 83, s. 4. The section also contains a proviso that it shall not repeal any provision in the *Wills Act*, 7 *Will.* 4 & 1 *Vict. c. 26*, and a proviso as to the examination of defendants in courts of equity.

(b) *R. v. Webb*, 11 *Cox*, C. C. 133.

restored by Lord Denman's Act (6 & 7 Vict. c. 85); but Rolfe, B., held that they were admissible. They could not be either gainers or losers by the event of the trial then proceeding, and they could not be considered as parties to the proceeding then before the Court. (e)

The 14 & 15 Vict. c. 99, s. 2, enacts 'that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, *the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended*, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.' (d)

Sec. 3. 'But nothing herein contained shall render any person *who in any criminal proceeding is charged with the commission of any indictable offence*, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.' (e)

In any criminal proceeding defendants jointly indicted for or charged with the commission of any offence, and on their trial, cannot be called as witnesses for or against themselves or each other, notwithstanding anything contained in the 14 & 15 Vict. c. 99, ss. 2 and 3. Four prisoners were jointly indicted for night poaching, and during their trial, and at the close of the case for the prosecution, it was proposed to call one of the prisoners to prove an *alibi* for another of them. The proposed witness had been examined before the justices on the committal of the other three prisoners, and had given evidence of an *alibi*, and had been bound over, by recognisance, by the justices to give evidence on the trial under 30 & 31 Vict. c. 35, s. 3, but had been afterwards taken into custody, and committed, and was indicted jointly with the others. No *nolle prosequi* was entered for him, nor did he plead guilty, and no application had been made for a separate trial. The evidence was rejected. Held, that the evidence was properly rejected, and that the conviction was right. (f) If two prisoners be jointly indicted, and one alone be given in charge to the

14 & 15 Vict.  
c. 99, s. 2.  
Parties to be  
admissible  
witnesses.

Nothing herein  
to render a  
person charged  
with any in-  
dictable  
offence, &c.,  
competent or  
compellable to  
give evidence  
for or against  
himself, &c.

(c) Reg. v. Drury, 3 C. & K. 190. It will be observed that it was not even contended in this case that the prisoners were incompetent, excepting by reason of the proviso, and that proviso is now repealed.

(d) The 17 & 18 Vict. c. 122, s. 15, enacts that this section 'shall not be deemed to apply to any prosecution, suit, or other proceeding in respect of any offence, or for the recovery of any penalty or forfeiture, under any law now in force, or hereafter to be made relating to customs or inland revenue.' See 39 & 40

Vict. c. 36, in the Appendix.

(e) Sec. 4 provides that nothing in this Act shall apply to proceedings in consequence of adultery, or breach of promise of marriage; and sec. 5, that the Act shall not repeal any provision in the Wills Act, 7 Will. 4 & 1 Vict. c. 26.

(f) R. v. Payne, 41 L. J. M. C. 65. Before this case there was some doubt about this. See 1 Hale, 305; 2 Stark. Ev. 11. See Percy Cresby's case, Noy, 154, cited 2 Hale, 234. R. v. Lyons, 9 C. & D. 175. See also Dealey, 11 Cox, C. C. 607.

jury, the other is an admissible witness (though neither acquitted nor convicted, and though a *nolle prosequi* is not entered) upon the trial of the prisoner with whom the jury are charged. (*g*)

Where one of several prisoners jointly indicted is acquitted, he is a competent witness against the others; (*h*) and it is equally clear that he is a competent witness for the others.

Where, before the 14 & 15 Vict. c. 99, George and Ford were jointly indicted for housebreaking, and George pleaded guilty, but was not sentenced; Coltman, J., held that he might be called as a witness for Ford. (*i*)

So where Hinks and Waywood were jointly indicted for larceny, and Waywood pleaded guilty, but judgment was respited in his case, and the trial proceeded against Hinks, and Waywood was admitted as a witness for the prosecution; it was held, upon a case reserved upon the question whether he was a competent witness under the 6 & 7 Vict. c. 85, s. 1, that he was admissible at common law. (*j*)

Where Jackson and Cracknell were jointly indicted for forgery, and Jackson, who was also charged with having been previously convicted of felony, pleaded guilty to the charge of forgery, but denied his previous conviction, and the jury found that he had been previously convicted; Erle, J., was of opinion that the proper course was to pass sentence upon him, and so put an end to the whole matter as regarded him, before he allowed him to give evidence for the other prisoner; and this course was adopted. (*k*)

Wherever it has been intended to call a prisoner as a witness against those jointly indicted with him, the practice has been to obtain the leave of the court to offer no evidence against the particular prisoner, and to take an acquittal of him before examining him as a witness. (*l*)

The 16 & 17 Vict. c. 83, s. 1, enacts that 'on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.'

Sec. 2. 'Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife

A prisoner who is acquitted is competent.

A prisoner who has pleaded guilty but is not sentenced, is a competent witness for another prisoner. Or against another prisoner.

Husbands and wives of parties to be admissible witnesses.

Except in criminal cases and in

(*g*) Winsor v. The Queen, 35 L. J. M. C. 161; see this case *ante*, p. 603. See R. v. Gallagher, 13 Cox, C. C. 61.

(*h*) R. v. O'Donnell, 7 Cox, C. C. 337, five judges on a case reserved in Ireland.

(*i*) Reg. v. George, C. & M. 111. Reg. v. King, 1 Cox, C. C. 232, Platt, B., after consulting Erle, J. Reg. v. Arundel, 4 Cox, C. C. 260, Patteson, J.

(*j*) Reg. v. Hinks, 1 Den. C. C. 84. 2 C. & K. 462. S. C. *ante*, p. 603.

1 Cox, C. C. 289. The only observation as to the 6 & 7 Vict. c. 85, was made by Alderson, B., in answer to the statement that Waywood was a party individually named in the record, who said that he was not a party to the issue. Hawkesworth v. Showler, 12 M. & W. 45.

(*k*) Reg. v. Jackson, 6 Cox, C. C. 525.

(*l*) Rex v. Rowland, R. & M. N. P. R. 401. Reg. v. Owen, 9 C. & P. 83; *ante*, p. 603.

competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery.' (m)

cases of adultery.

Sec. 3. 'No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during marriage.' (n)

Husbands and wives not compelled to disclose communications.

With the exceptions hereafter pointed out, husband and wife have always been incompetent to give any evidence for or against each other in criminal cases; (o) therefore the wife of a prisoner cannot give evidence for him.

And they cannot be witnesses against each other, by reason of the dissensions and distrusts that it would occasion, inconsistent with the happiness of married life and the peace of families; (p) and therefore, on an indictment for bigamy, the first and true wife cannot be admitted to give evidence against her husband; (q) but, after proof of the first marriage, the second wife may be a witness. (r) And where an offence can only be committed by several joining in it, as conspiracy or riot, the husband or wife of one of those who are jointly indicted has always been an incompetent witness for or against any of the others; for the acquittal or conviction of such other would directly tend to the acquittal or conviction of the wife or husband, as the case might be. Thus on a prosecution against several persons for a conspiracy, the wife of one of the defendants was held not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for her husband. (s) And wherever the acquittal of the principal would enure to the accessory's discharge, it may well be doubted whether the wife or husband of the accessory would have been a competent witness for the principal.

Against each other.

On an indictment for conspiracy against Hamp and others, Mrs. Broome was examined for the prosecution, and it appeared that her husband had been bound by recognizances to appear and take his trial for cheating at play at a previous assize, but that he did not appear, and had not returned home since, and the wife being asked whether she had not seen her husband in Birmingham a few days before, said, 'I decline to answer the question, because my husband did not appear to his recognizance;' Lord Campbell, C. J., 'I think on that the question ought not to be proposed.' (t)

The wife of one of several prisoners on their trial at the same time on a joint indictment cannot be called as a witness for or against any of the prisoners, notwithstanding that the indictment contains more counts than one respectively charging distinct

Wife of one prisoner incompetent against another prisoner.

(m) So much of this section as is contained in the words 'or in any proceeding instituted in consequence of adultery' are repealed by 32 & 33 Vict. c. 68, s. 1.

(n) Sec. 4 repeals so much of sec. 1 of the 6 & 7 Vict. c. 85, as provides that the Act shall not render competent the husbands and wives of the parties therein enumerated.

(o) Gilb. Ev. 119. 2 Hawk. P. C. c.

46, s. 70.

(p) Gilb. Ev. 119. 2 Hawk. P. C. c. 46, s. 70. *Barker v. Dixie*, Cas. temp. Hardw. 264.

(q) *Ante*, p. 315.

(r) *Wells v. Fisher*, 1 M. & Rob. 99.

(s) *Ante*, p. 143. *R. v. Frederick*, 2 Str. 1095. *R. v. Smith*, R. & M. C. C. R. 289. See *Rudd's case*, 1 Leach, 127.

(t) *Wells v. Fisher*, 6 Cox, C. C. 167.

offences. (*u*) And where upon an indictment against Webb and three other prisoners for sheep-stealing the counsel for the prosecution proposed to call the wife of Webb to prove facts against the other prisoners, and urged that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to cause the acquittal or conviction of the other prisoners that the wife of one prisoner was incompetent to give evidence for or against the other prisoners; but Bolland, B., held that the witness was incompetent. (*v*)

Not competent, even by consent.

In a civil case Lord Hardwicke would not suffer a wife to give evidence for her husband, even by consent of the other party. (*w*) And even after a divorce by Act of Parliament, the wife is not competent in an action against her husband to give evidence of anything that happened during coverture, (*x*) on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation. (*y*) The rule, however, must be understood as applying to cases where the husband or wife are directly accused of a crime, and not as extending in the same degree to collateral suits or proceedings between third persons. It was, indeed, once held, in *Rex v. Cliviger*, (*z*) that husband and wife in collateral cases are not to be permitted to give any evidence that might even tend to criminate each other; for though the evidence of the one could not be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended. And the principle of that decision would extend to prevent the one from being called to contradict the other; for the tendency of the evidence of the latter witness would be to prove the former guilty of perjury. (*a*) But the rule laid down in the case of *Rex v. Cliviger* was much discussed in the case of *Rex v. All Saints, Worcester*, (*b*) in which the Court of King's Bench was of opinion that it had been expressed in terms too large and general; and held, that where the evidence of the wife did not directly criminate the husband (as in a proceeding relating to other matters, and not to any criminal charge against him), and never could be used against him, nor could he ever be affected by the judgment of the Court founded upon such evidence, she was a competent witness.

Collateral cases.

So where upon the trial of an appeal a pauper proved his marriage with E., and M. B. was then called by the other side to prove that she had previously been married to the pauper; it was held that she was competent for this purpose; as nothing that was said by her in this case, nor any decision of the Court of Sessions founded upon her testimony, could afterwards be

(*u*) *R. v. Thompson*, 41 L. J. M. C. 112; 12 Cox, C. C. 202. Before this case there was some doubt about this. See *R. v. Payne*, *ante*, p. 619. Reg. v. Sills, 1 C. & K. 494, July, 1844. Reg. v. Moore, 1 Cox, C. C. 59, August, 1843. Reg. v. Bartlett, 1 Cox, C. C. 105, April 1844. Reg. v. Denslow, 2 Cox, C. C. 230, A.D. 1847.

(*v*) *Rex v. Webb*, Bushell, J., and T. Croome, Gloucester Spr. Ass. 1830. MSS. C. S. G.; and see Dalt. c. 164, p. 540, cited 1 Hale, 301.

(*w*) Cas. temp. Hardw.

(*x*) *Monroe v. Twisleton*, Peake Ev. Appendix. So a widow cannot be called by the defendant to disclose conversations between herself and her late husband, in an action by his executors. *Doker v. Hasler*, R. & M. N. P. R. 198, ruled by Best, C. J. But see *Beveridge v. Minter*, 1 Carr. & P. 364.

(*y*) By Lord Ellenborough, in *Aveson v. Kinnaird*, 6 East, 192.

(*z*) 2 T. R. 263.

(*a*) 2 T. R. 268.

(*b*) 6 M. & S. 194.



received in evidence to support an indictment against her husband for bigamy. (c)

But where on an indictment for stealing wheat, Eliza Ellis was called on the part of the Crown to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner; Taunton, J., doubted whether she could be so examined, as her evidence might be used as a ground of convicting her husband by causing a charge to be made against him. The two preceding cases were then cited. Taunton, J., 'I am against breaking down the rules of law. My opinion is to adhere to the rule laid down by Lord Hale. (d) In *Rex v. All Saints, Worcester*, at the time when the witness was examined, there was nothing in her evidence to criminate her husband. Here it is sought to make the woman charge her husband, not obliquely, but directly and immediately.' Having consulted Littledale, J., the learned judge added, 'We both agree in opinion that the witness is incompetent. We think *Rex v. All Saints, Worcester*, very distinguishable. There at the time when the wife was examined there was nothing in her evidence to criminate her husband. Here the evidence would directly charge the husband with being a principal; and although there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now, the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be received.' (e)

But where the first count charged Halliday with obtaining money by falsely pretending that a document produced to a bank by Eliza, the wife of D. Thomas, had been filled up by his authority; the second count was similar as to another document; and the third count charged Halliday and Eliza Thomas with a conspiracy to cheat the bank; but she was not tried with Halliday. The evidence of D. Thomas was essential to prove that he had given no authority to fill up the documents; but it was objected, on the authority of the preceding case, that he was incompetent to prove his wife guilty of a conspiracy, or even to prove the counts for false pretences; but Byles, J., thought his evidence admissible on all the counts; and the jury found the prisoner guilty on the first count only; and, on a case reserved, it was held that the evidence of the husband was admissible in support of the first count. His evidence no doubt tended to show that his wife had acted criminally, but that count contained no charge against her. (f)

Where, however, the husband has either been convicted or acquitted of the same felony, respecting which the wife is called

A wife is not competent to prove that a prisoner committed a felony in company with her husband.

The evidence of a husband is admissible, although it tends to inculpate his wife in the same charge with the prisoner against whom the evidence is given.

Where husband has been convicted or acquitted

(c) *Rex v. Bathwick*, 2 B. & Ad. 639. The Court doubted whether the competency of a witness could depend upon the marshalling the evidence, or the stage of the case at which the witness was called. See Peat's case, *ante*, p. 316.

(d) I am not aware of the passage referred to by the learned judge, but see 2 Hale, P. C. 279, 1 Hale, P. C. 301. C. S. G.

(e) *Rex v. George Glead*, Gloucester Lent Ass. 1832. MSS. C. S. G.

(f) *Reg. v. Halliday*, Bell, C. C. 257. The Court seem to have considered the wife competent on all the counts, as Pollock, C. B., added, 'Indeed, in this indictment she was not charged at all, although she was involved in the conspiracy charged in the third count; but that did not prevent the husband's evidence from being admissible.' This case was not argued, and no previous decision referred to when it was decided.

of a felony, wife may be examined to prove case against another prisoner.

as a witness, she is competent to be examined. Thus, on an indictment for sheep-stealing, the wife of a person, who had been previously convicted of stealing the same sheep, was held a competent witness for the prosecution. (*g*) So where one prisoner pleaded guilty, it was held that his wife was a competent witness against the other prisoner jointly indicted with him, as on the issue to be tried her husband was no longer interested. (*h*) So where a wife and her paramour were jointly indicted for stealing the goods of the husband, it was held that the husband was a competent witness against the paramour; for the wife was entitled to be acquitted, as she could not be guilty of stealing her husband's goods. (*i*) And in *Thurtell's case* Mrs. Probert was examined as a witness against Thurtell after her husband was acquitted. (*j*) In the same manner if Probert had not been apprehended, and Thurtell only had been on trial at the time, the wife of Probert would have been capable of being examined; because the question would have been whether Thurtell was guilty, and not whether Thurtell and Probert were guilty. (*k*)

They may be called to contradict each other.

And the reasoning upon which the decision in *Rex v. All Saints, Worcester*, was founded, is equally strong to show that one may be called as a witness to disprove what has been stated by the other, and that either the party who has called the one, or the opposing party, may call the other for the purpose of contradicting (*l*)

Indictment for abduction.

Upon an indictment for forcible abduction and marriage of a woman, she may be a witness for the Crown, (*n*) or the prisoner; (*o*) but this is rather a case which does not fall within the general rule than an exception to it; for she is not legally his wife, a contract obtained by force having no obligation in law. (*p*) Indeed, if the actual marriage is valid (as where the woman after abduction consents to the marriage voluntarily, and not induced by any precedent menace), or if the marriage has been ratified by subsequent voluntary cohabitation, it has been said she is not competent for or against the prisoner. (*q*) But there are very considerable authorities to the contrary. (*r*) And in one case, where the defendants were indicted for a misdemeanor, in conspiring to carry away a young lady under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and, in another count, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; Hullock, B., was of opinion that, even assuming the young lady to be at the time of the trial the lawful wife of one of the defendants, she was a competent

(*g*) *Reg. v. Williams*, 8 C. & P. 284. Alderson, B.

(*h*) *Reg. v. Thompson*, 3 F. & F. 824, Keating, J.

(*i*) *Reg. v. Glassie*, 7 Cox, C. C. 1. Lefroy, C. J., and Monahan, C. J.

(*j*) Per Alderson, B., *Reg. v. Williams*, *supra*.

(*k*) Per Alderson, B. *Hawkesworth v. Showler*, 12 M. & W. 45.

(*l*) 1 Phill. Ev. 80, 7th ed.

(*n*) Gilb. Ev. 120. 1 Hale, P. C. 301, 302. 2 Hawk. c. 46, s. 78. *Fulwood's case*, Cro. Car. 488. Brown's case, 1 Ventr. 243. Swendsen's case, 5 St. Trials, 456.

(*o*) *Rex v. Perry*, at Bristol, 1794, cited by Abbott, C. J., in *Rex v. Serjeant, R. & M. N. P. C. 354*. 1 Hawk. P. C. c. 41, s. 13.

(*p*) Gilb. Ev. 120. 1 Hale, P. C. 302, 660, 661. Bull. N. P. 286.

(*q*) 1 Hale, P. C. 302, 661. 1 Phill. Ev. 84, 7th ed. 2 Stark. Ev. 553.

(*r*) 4 Blac. Com. 209. 1 East, P. C. 41, s. 5, p. 454.

witness for the prosecution, although there was no evidence to support that part of the indictment which charged force. (s)

The wife is also admitted as a witness against her husband, *ex necessitate*, in a prosecution of him for offences against her person. (t) So her dying declarations are admissible against him in the case of murder. (u) In an indictment of William Whitehouse, (v) at Stafford, upon Lord Ellenborough's Act, for shooting at his wife, she was admitted as a witness for the prosecution by Garrow, B., after consulting Holroyd, J., upon the ground of the necessity of the case; and Holroyd, J., sent Garrow, B., the case of *Rex v. Jagger*, Yorkshire Assizes, 1797, where the husband had attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband; and Rooke, J., afterwards delivered the opinion of the twelve judges that the evidence had been rightly admitted. Holroyd, J., however, said he thought the wife could only be admitted to prove facts which could not be proved by any other witness. (w) So on an indictment against a man for beating his wife, she was held competent. (x) And the wife is always permitted to swear the peace against her husband. (y) And her affidavit has been permitted to be read on an application to the Court of King's Bench for an information against the husband for an attempt to take her away by force after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial. (z) And it seems to be now settled, that in all cases of personal injuries committed by the husband and wife against each other, the injured party is an admissible witness against the other. (a)

Indictment  
for personal  
violence.

But this rule seems to be confined to cases where the charge affects the liberty or the person of the wife. Thus it has been decided that in an indictment for a conspiracy in procuring a lady, then a ward in chancery, to marry, the wife was not a good witness for one of the co-defendants, if her evidence might enure to the acquittal of her husband; (b) and since she could not be admitted in favour of her husband, it follows necessarily that she could not be a witness against him. (c) So on an indictment against the wife

Not competent in cases where there is no personal injury.

(s) *Rex v. Waekfield*, see the trial, published by Murray, p. 257. 2 Lewin, 1 & 279. In *Perry's case*, *supra*, no force was used. See per Hullock, B., in *R. v. Wakefield*. In this case it was contended that the wife's incompetency might be shown either by examining her on the *voire dire*, or by other witnesses, and for the defendant it was proposed to show her incompetency by other witnesses. Hullock, B., ruled that as this was a point of practice, and he saw some inconvenience in not calling her, which would not exist if she were called, she should be called.

(t) *Lord Audley's case*, 1 St. Tr. 393. This case has been denied to be law, but is now established by the highest authorities. 1 Hale, P. C. 301. 2 Hawk. P. C. c. 46, s. 77. Bull, N. P. 287. *Rex v. Serjeant, R. & M. 354.* Reg. v. Serjeant,

8 C. & P. 604. 1 East, P. C. c. 11, s. 5, p. 455.

(u) *Woodcock's case*, 1 Leach, 500. *John's case*, *ibid.* 504, n. (a).

(v) MSS. Russell, Serjt.

(w) See *Reg. v. Pearce*, 9 C. & P. 667. S. P.

(x) By Lord Raymond on the authority of *Lord Audley's case*, *Rex v. Azire*, 1 Stra. 633. Bull. N. P. 287.

(y) Bull. N. P. 287.

(z) *Lady Lawley's case*. *Ibid.*

(a) 1 East, P. C. c. 11, s. 5, p. 455. In the *Wakefields' case*, p. 257, Hullock, B., said, 'I take it, it is quite clear now that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person.'

(b) *Rex v. Locker*, 5 Esp. 107.

(c) *Rex v. Serjeant, R. & M. 354.*

of W. S. and others, for a conspiracy in procuring W. S. to marry, Abbott, C. J., refused to admit W. S. as a witness in support of the prosecution. (*d*) So a wife is not admissible as a witness against her husband on a charge of deserting her and her children against the 5 Geo. 4, c. 83. (*e*)

High treason.

In the case of high treason it has been said that a wife shall be admitted against her husband, because the tie of allegiance is more obligatory than any other; (*f*) but there are high authorities to the contrary. (*g*)

Competency of a woman living as a wife.

Whether a woman who has cohabited with a man as his wife, but who is ready to swear she is not married to him, will be allowed to give evidence on the part of the man, has been considered a doubtful question. (*h*) But it seems now to be settled that the rule relates to persons who have entered into the relation of husband and wife; and does not extend to those who, not being married, have lived together and cohabited as man and wife. (*i*) Thus where a woman had been married to a man whom she had not seen for thirty years, and then married again, but afterwards found that the man she had first married was alive; as the second marriage was a mere nullity, she was held competent to give evidence of statements made by her second husband during the time they cohabited. (*j*) So where the prisoner had married his deceased wife's sister, Erle, J., held that the wife was a competent witness against him, as the marriage was void, and that the wife might prove her relationship to the former wife on the *voire dire*. (*k*) So a kept mistress, who has passed by the name and appeared in the world as the wife of her protector, has been held to be a competent witness for him. (*l*)

A wife competent against is so for her husband.

In the case of *Rex v. Perry*, Gibbs, C. J., stated that he could see no distinction between admitting a wife for and against her husband. 'The *King v. Perry*,' said Abbott, C. J., in *Rex v. Serjeant*, (*m*) 'was much talked about at the time, and C. J. Gibbs expressed his surprise that any doubt should have been entertained that a wife was in all cases a competent witness for her husband when admissible against him.'

Objections to competency, when to be taken;

'Anciently the rule was, that if there were any objection to the competency of a witness, he should be examined on the *voire dire*, (*n*) and it was too late after he was sworn in chief. (*o*) But for the convenience of the court, and the furtherance of justice

(*d*) *Rex v. Serjeant*, R. & M. N. P. R. 352. But it is not necessary, it should seem, that there should be force employed in order to make the husband or wife competent. In the case of the Wakefields before mentioned for abduction, Hullock, B., was of that opinion, and he mentioned that he had seen a report of the case of *Rex v. Perry*, tried before Gibbs, C. J., as Recorder of Bristol, where the wife was held competent, and that no force was used in the abduction in that case.

(*e*) *Reeve v. Wood*, 10 Cox, C. C. 58.

(*f*) *Bull. N. P.* 236. *Gilb. Ev.* 120.

(*g*) 1 Hale, P. C. 301. 1 Brown, 47.

(*h*) *Campbell v. Twemlow*, 1 Price, 81. *Per Richards*, B., 1 Price, 83.

(*i*) 1 Phill. Ev. 69.

(*j*) *Wells v. Fletcher*, 5 C. & P. 12

S. C. as *Wells v. Fisher*, 1 M. & Rob. 99.

(*k*) *Reg. v. Young*, 5 Cox, C. C. 296. See *Reg. v. Chadwick*, 11 Q. B. 173, *ante*, p. 270. *Reg. v. Blackburn*, 6 Cox, C. C. 333.

(*l*) *Batthews v. Galindo*, 4 Bingh. R. 610. *Reg. v. Young*, 2 Cox, C. C. 291, *Erle*, J. S. P.

(*m*) R. & M. N. P. R. 354.

(*n*) The *voire dire* is, when it is prayed upon a trial at law that a witness may (previously to his giving evidence in the cause) be sworn to speak the truth (in old French *voire dire*) whether he shall lose by the matter in controversy. *Blount's Law Dictionary*.

(*o*) *Turner v. Pearte*, 1 T. R. 719.

(as the incompetency may not at first be suspected), the rule is now so far relaxed that if it is discovered during any part of the witness's examination, or even after his cross-examination, that he is incompetent, the objection may be taken, and his evidence will be struck out. (*p*) But it seems that the objection comes too late after the witness has left the box ; (*q*) and it has been held that after a witness has been dismissed without any objection to his competency, it is not allowable to call a witness to prove his incompetency. (*r*) With respect, however, to the power of questioning a witness for the purpose of discovering his incompetency, there is still a material difference, which will presently be pointed out, between an examination on the *voire dire* and one after the witness has been sworn in chief.

The party against whom a witness is called may examine him respecting his competency on the *voire dire*, or may call another witness and produce other evidence in support of the objection. (*s*) The old rule is said to have been, (*t*) that if the witness were examined by the opposite party as to the fact of the objection, and denied it upon his oath, the party would not be at liberty to call afterwards another witness to prove it, in order to repel him from giving evidence, unless the other side acquiesced. But the modern and more convenient practice seems to be, that if the fact of incompetency is satisfactorily proved, the witness will be incompetent, although he may have ventured to deny it on the *voire dire*. (*u*)

how to be supported.

It is now, however, clearly settled that, where a question arises

Where a question is raised

(*p*) *Jacobs v. Leybourn*, 11 M. & W. 685. 1 Phill. Ev. 153. *Turner v. Pearte*, 1 T. R. 720. *Howell v. Lock*, 2 Campb. 15. *Stone v. Blackburn*, 1 Esp. 37. *Perigal v. Nicholson*, Wightw. 64. But where upon a trial for high treason it appeared, after a witness had been examined for the Crown, without objection on the part of the prisoner, that he had been misdescribed in the list of witnesses, which is required by the 7 Ann. c. 21, s. 14, to be given to the prisoner previous to his trial, the Court would not permit the evidence of the witness to be struck out ; but said, the objection ought to have been taken in the first instance ; otherwise a party might take the chance of getting evidence which he liked, or, if he disliked the testimony, he might then get rid of it on the ground of misdescription. *Rex v. Watson*, 2 Stark. N. P. C. 158. And upon this ground, Mr. Starkie expressed his opinion that a party who was cognizant of the interest of a witness at the time he was called, was bound to make his objection in the first instance. 1 Stark. Ev. 137 ; and see 1 Phill. Ev. 154, note (3), and *Hartshorne v. Watson*, 5 Bing. N. C. 477.

(*q*) 1 Phill. Ev. 153. *Beeching v. Gower*, Holt, N. P. R. 314.

(*r*) *Dewdney v. Palmer*, 4 M. & W. 664.

(*s*) *Per Hullock, B., Wakefields' case*, p. 157. 2 Lew. 279.

(*t*) By Lord Hardwicke in *Lord Lovat's*

case, 9 St. Tr. 647. See also the observations of Parker, C. J., in *Rex v. Muscot*, 10 Mod. 193, in which case it was held that in criminal cases there could be an examination on the *voire dire*.

(*u*) 1 Phill. Ev. 154. In several cases it seems to have been considered that it is in the discretion of the judge whether other evidence should be called to support the objection before the witness is examined. And if the judge refuse to allow it to be then given, it seems that it may be given as part of the case of the party raising the objection, and if it support the objection, then the evidence of the witness objected to may be struck out of the notes. *Rex v. Wakefield*, note (*α*), M. & Malk. 197. *Jones v. Fort*, M. & Malk. 196. In this case the question was whether the defendant's examination taken under a commission of bankrupt was admissible, and Lord Tenterden, C. J., refused to allow evidence to be given tending to show that from the mode of taking it, and the state of the defendant's health, it was inadmissible before the examination was read, but held that it might be received in the defendant's case, and if the objection was supported, the evidence might be struck out. It certainly, however, is much the more convenient course, as well for the purpose of saving time, as to prevent the jury from being influenced by inadmissible evidence, to receive the evidence before the examination of the witness. C. S. G.

as to the competency of a witness, all the evidence on both sides should be heard at once by the court.

as to the competency of a witness before he is sworn, the proper course is to receive all the evidence upon the question, both to impeach the competency of the witness and in support of it, before he is allowed to give any evidence. Thus in a case at York, where a witness was objected to by a prisoner as incompetent on the ground that he was insane, and the question arose as to the mode to be adopted under such circumstances; Parke, B., consulted the judges upon it before he went the circuit, and they were of opinion that it ought to be tried on the *voire dire*, and evidence admitted both on the part of the prisoner and on the part of the prosecution to impeach the competency of the witness, and in support of it; (v) and it has since been held that where an objection is raised to the competency of a witness on the ground that he is insane, it is for the court to decide whether such person has the sense of religion on his mind, and whether he understands the nature and sanction of an oath; and, in order to determine these questions, he may be examined and cross-examined, and witnesses on both sides may be examined, in order to found and to meet the objection to his competency before he himself is sworn. (w) If the court decides that he is a competent witness, 'then the jury are to decide on the credibility and weight of his evidence.' (x)

Where the question arises after a part examination of the witness.

In one case, however, it has been intimated that in every case where any question is raised about the competency of a witness after he has been sworn and partly examined, there ought properly to be an inquiry made of the witness, who should be sworn 'to make true answer to all such questions as the court should demand of him;' in other words, that an examination on the *voire dire* may be instituted at any period of the examination. (y)

(v) Anonymous, stated by Parke, B., in *Attorney-General v. Hitchcock*, 1 Exch. R. 91, and also in *Bartlett v. Smith*, 11 M. & W. 483.

(w) *Reg. v. Hill*, 2 Den. C. C. 254.

(x) Per Lord Campbell, *ibid*.

(y) Per Lord Abinger, C. B., and Rolfe, B. *Jacobs v. Leybourn*, 11 M. & W. 685. In *Cleave v. Jones*, Hereford Sum. Ass. 1849, MSS. C. S. G., the plaintiff's counsel, in order to take the case out of the Statute of Limitations, tendered an account in the defendant's handwriting; and Rolfe, B., held that the defendant's counsel might at once put in two letters written by the plaintiff to the defendant, in order to show that the account was a confidential communication by the defendant to the plaintiff as her attorney. So on a subsequent trial of the same cause, when the same account was tendered in evidence, the counsel for the defendant claimed the right to interpose, and put in a letter of the plaintiff, and to call a witness to show that the account was written out and sent by the defendant to the plaintiff in consequence of such letter; and Erle, J., held that this might be done; and upon the defendant's counsel insisting that the witness ought to be sworn on the *voire dire*, Erle, J.,

held that that was the proper course, as the question whether the account was a privileged communication was to be determined by himself; and the letter and evidence of the witness were received, and the account rejected as a privileged communication. *Cleave v. Jones*, Hereford Sum. Ass. 1851; and the Court of Exchequer held that this ruling was correct. 7 Exch. R. 421. In an action by the payee against the maker of a promissory note, payable *two* months after date, with a plea that the defendant did not make the note, the defendant's signature to the note was proved; but the word '*two*' was evidently written on an erasure. Erle, J., said that it was incumbent on the plaintiff to explain this, and a witness was called for the plaintiff to prove that the note was in the same state when it was signed by the defendant. Before the note was read, it was proposed, on the part of the defendant, to call witnesses to prove that, when the note was signed by the defendant, it was payable '*three*' months after date; it was objected that this evidence should be given as part of the defendant's case; but Erle, J., at once received the evidence of two witnesses for the defendant, and upon their evidence decided that the alteration

On a prosecution for rape it appeared that the prosecutrix was deaf and dumb; and her father, who was sworn to interpret her evidence, said that he believed her to be ignorant of the nature of an oath. An expert, however, came, and from his report to the court the prosecutrix was sworn, and her evidence taken down as interpreted by the expert. In the course of her examination it became apparent that she did not understand the questions, and that her answers could not be relied upon. The judge directed her to stand down, and struck out her evidence from the case: Held, that although the prosecutrix had been sworn, the judge acted rightly in striking out and withdrawing her evidence from the jury. (z)

Every question respecting the competency of a witness is to be determined by the court and not by the jury. (a)

The question is for the court.

An examination on the *voire dire* is allowed to be conducted without strict regard to the general rule of evidence, which requires the best possible proof of a fact, and admits no other. Thus a witness may be examined as to the contents of a written document without a notice to produce; (b) for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection. (c) And the same relaxation is allowed in removing an objection of incompetency as in raising it. Thus where in an action brought by a chartered company, a witness for the plaintiffs admitted on the *voire dire* that he had been a freeman of the company, but added that he was then disfranchised; Lord Kenyon ruled that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent. (d) So where, before the 6 & 7 Vict. c. 85, a witness was objected to as next of kin in an action by an

Mode of examination on *voire dire*.

was not accounted for to his satisfaction. *Painter v. Hill*, 2 C. & K. 924, note. And where a witness for a plaintiff, being about to state the contents of a letter, a letter was put in his hands by the defendant's counsel, and he did not admit it to be the same; and the judge held that the defendant could not at that stage of the cause give evidence that it was the original; the Court held that this was erroneous, and that the judge was bound at once to hear the evidence on both sides, and decide whether the document was the original; and Parke, B., said, 'It is now well settled that all these preliminary questions, on which the reception of evidence depends, ought not to be submitted to the jury, but must be decided by the judge himself.' *Boyle v. Wiseman*, 11 Exch. R. 360; and see *Campbell's case*, ante, p. 358.

(z) *R. v. Whitehead*, 10 Cox, C. C. 234.

(a) *Reg. v. Hill*, 2 Den. C. C. 254, and see *supra*, note (y).

(b) *Howell v. Locke*, 2 Campb. 15.

(c) See *Butler v. Carver*, 2 Stark. R. 434. On the passage in the text being cited in *Macdonnell v. Evans*, 937, Maule, J., said, 'In many cases wit-

nesses are called whom the opposite party has no reason to expect to see; the reason, therefore, given in that book is not a good one. An examination on the *voire dire* is for the purpose of establishing something of which the court is to be the judge and not the jury. It may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury.' Either the 'no' or 'not' in italics seems inserted by mistake in the report.

(d) *Butchers' Company v. Jones*, 1 Esp. 162. See also *Botham v. Swingle*, 1 Esp. 164. *S. C.* Peake, N. P. C. 219, where before 6 & 7 Vict. c. 85, the witness was allowed to remove an objection of interest raised on the *voire dire* by his own statement that he had become a bankrupt, and his estate had been assigned. See also *Rex v. Gisburn*, 15 East, 57. So where a bankrupt, before the above Act, called as a witness, stated on the *voire dire* that he had obtained his certificate and released his assignees; *Park, J. A. J.*, held him competent, without production of the release. *Carlisle v. Eady*, 1 C. & P. 234. See also *Bunter v. Warre*,

administrator, but on re-examination answered that he had released all his interest, this was held by Lord Ellenborough to remove the objection. (e)

But it is only on the *voire dire* that the general rules of evidence are thus relaxed; for although objections to the competency of a witness may now be made at any stage of the trial, yet they are not to be attended with the privileges of an examination upon the *voire dire*. (f) So where a party, who calls a witness, attempts to remove the objection by other independent proof, and not on the *voire dire*, he will then be subject to all the general rules of evidence. (g) So where the objection is not raised on the *voire dire*, but appears in evidence in any other manner, the other party in answering it is bound by the usual rules of evidence. (h)

Judge or jury  
competent.

It is no exception against a person giving evidence for or against a prisoner, that he is one of the judges or jurors who is to try him. (i) And in the case of Hacker, two of the persons in the commission for the trial came off from the bench, and were sworn, and gave evidence, and did not go up to the bench again during his trial. (j)

(e) *Ingram v. Dade*, MS. 1 Phill. Ev. 155. *Lunniss v. Row*, 10 A. & E. 606, overruling *Goodhay v. Hendry*, M. & Malk. 319, and a case in a note, *ibid.* 321. See 1 Phill. Ev. 156.

(f) *Howell v. Lock*, 2 Campb. 14.

(g) *Corking v. Jarrard*, 1 Campb. 37.

(h) *Botham v. Swingler*, 1 Esp. N. P. C. 165, by Lord Kenyon; but see *Cleave v. Jones*, *ante*, p. 628, note (y).

(i) 2 Hawk. P. C. c. 46, s. 83.

(j) *Ibid.*



## ADDENDA ET CORRIGENDA

TO

## VOLUME I.

The 22 & 23 Vict. c. 17, s. 1, does not apply to the offence of 'at- Page 3.  
tempting to obtain money or other property by false pretences.' *R. v.*  
*Burton*, 13 Cox, C. C. 71.

On the trial of an indictment for robbery at the Kent assizes, the Page 5.  
offence appeared to have been committed in Surrey, at a distance of about  
320 yards from the boundary of Kent and Surrey, as measured by a  
direct line, but at considerably more than 500 yards by the nearest road ;  
and Parke, B., held that the distance must be measured in the direct line,  
and therefore the prisoner was triable in Kent. *Reg. v. Wood*, 5 Jurist,  
225 ; see *Mouflet v. Cole*, 42 L. J. Ex. 8.

A hulk retaining the general appointments of a ship, registered as a Page 17.  
British ship, and hoisting the British ensign, although only used as a  
floating warehouse, is *prima facie* sufficiently a British ship to be within  
the 17 & 18 Vict. c. 267, and a crime committed thereon is within the  
jurisdiction of the Admiralty. *R. v. Armstrong*, 13 Cox, C. C. 184,  
Archibald, J.

The 37 & 38 Vict. c. 96 (the Statute Law Revision Act, 1874), repeals Page 31.  
3 & 4 Vict. c. 111, s. 2, in part, *i.e.*, from 'shall steal' to 'corporation  
or.' See 31 & 32 Vict. c. 116, s. 1, vol. 2, Larceny.

The Consolidation Acts as to punishment of principals in the second Page 81.  
degree and accessories are more correctly and at greater length set out,  
vol. 1, p. 185.

Add to note (b)—Trover for conversion of goods supplied by the plain- Page 83.  
tiffs to one Blenkarn. Blenkarn had taken premises at 37, Wood Street,  
and in ordering the goods had signed his name in such a way as to induce  
the plaintiffs to believe that he was a member of the well-known firm of  
Blenkiron and Co., Wood Street. For this fraud he was afterwards tried  
and convicted of obtaining goods by false pretences. Before his convic-  
tion, however, the defendants had honestly bought the goods in question  
from him, and had sold them again :—Held, that the defendants were  
entitled to judgment. The contract of the plaintiffs was with Blenkarn,  
and their intention being to part with the goods to their correspondent  
at 37, Wood Street, the property passed under it to him. Such con-  
tract, though voidable so long as the goods were in his hands, could not  
be avoided after the goods had been sold to a *bonâ fide* purchaser for  
value, so as to entitle the plaintiffs to recover them from such purchaser.  
By virtue of 24 & 25 Vict. c. 96, s. 100, on the conviction of Blenkarn,  
the property in the goods or proceeds revested in the plaintiffs, but such  
revesting did not relate back to the period previous to the conviction,  
when the goods were in the defendants' possession, and therefore the  
good title which they had acquired was not divested by the subsequent

conviction, so as to make them liable to be sued by the plaintiffs for the goods. The interpretation clause as to 'property' in sect. 1 of 24 & 25 Vict. c. 96, is not to be read into sect. 100, so as to render the defendants liable to restore to the plaintiffs the proceeds of their sale of the goods. *Lindsay v. Cundy*, 45 L. J. Q. B. 381.

Page 90.

By 24 & 25 Vict. c. 97, s. 77 (Malicious Injuries to Property Act), the Court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony, and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Page 136.

A person deaf and dumb from four years of age was indicted for larceny from the person, and not answering when called upon to plead, the jury found the prisoner 'mute by the visitation of God.' The Court then ordered a plea of 'not guilty' to be entered, and the trial to proceed. A relation of the person, who could in some degree communicate with the prisoner by means of signs, was sworn to interpret the nature of the proceedings and the evidence, and the Court assigned counsel to the prisoner. At the conclusion of the case, after the summing up of the presiding judge, the jury found the prisoner guilty, but in answer to a question left to them in the summing up found that the prisoner 'was not capable of understanding, and, as a fact, had not understood the nature of the proceedings':—Held, that the above finding shewed that the prisoner was at the time of the trial of non-sane mind; therefore, that the Court were wrong in entering a plea of not guilty, and in allowing the trial to proceed. That they ought to have discharged the jury, and ordered the prisoner to be detained during Her Majesty's pleasure, under 39 & 40 Geo. 3, c. 94, s. 2; and the conviction was quashed. *R. v. Berry*, 45 L. J. M. C. 123.

Page 270, et seq.

The 16 & 17 Vict. c. 107, except certain sections, is repealed by the 39 & 40 Vict. c. 36. See s. 288 of this Act, *post*, p. 701.

Page 319.

The 17 & 18 Vict. c. 102, so far as it is not repealed, and certain enactments amending the same, are continued until the 31st December, 1877, by the 39 & 40 Vict. c. 69.

Page 330.

On the trial of an indictment for fraudulently placing ballot papers in a ballot box at a municipal election contrary to 35 & 36 Vict. c. 33, s. 3, a sealed packet was produced under the order of a county court judge, obtained under 35 & 36 Vict. c. 33, sched. 1, rules 40, 41, part ii., r. 64, and the counterfoils and marked register and voting papers produced therefrom were given in evidence, and the face of the voting papers inspected: Held, that the evidence was properly admitted. *R. v. Beardsall*, 45 L. J. M. C., 157.

Page 405.

L. was mortgagee in fee of a dwelling house, the possession being left in the mortgagor. The mortgagor while in possession let the house to T. for a goods store. It was otherwise unoccupied. Early one morning, during the continuance of T.'s tenancy, L., without giving any notice to the mortgagor or to T., went to the house, in company with a carpenter and another man. The carpenter opened the front door, and the other man entered the house. L. and the carpenter remained on the doorstep, the latter being employed in putting on a new lock. While this was happening, T., and his brother-in-law, W., with several other persons came up, and T. and W. climbed into the house through a window, and after a slight struggle expelled L. and his men from the premises. L. indicted T. and W. and others for a forcible entry, riot, affray, and assault. T. and W. were tried and acquitted. They defended themselves by the same solicitor, and incurred joint costs. T. & W. then brought an action against L. for malicious prosecution, and obtained a verdict, subject to

leave to move to enter a verdict for L., upon the grounds, first, that there was no reasonable and probable cause for the prosecution ; second, that there was no evidence of malice ; third, that there was no joint cause of action. The Court of Exchequer having set aside the verdict, and entered a verdict for L., and the Court of Exchequer Chamber having reversed the decision of the Court of Exchequer :—Held, reversing the decision of the Court of Exchequer Chamber, that there was reasonable and probable cause for the prosecution, inasmuch as the facts shewed that T. and W. were, at the time of the expulsion of L., disturbing a possession which had been lawfully acquired by him. *Lows v. Telford*, 45 L. J. Ex. 613.

As to a body in whom the guardianship of the highway is vested having the right of removing obstructions in the highway, see *Bagshaw v. The Boston Local Board of Health*, 45 L. J. Chanc. 260. Page 439.

A. let to B. a field for the purpose of its being worked as a lime quarry. The ordinary way of getting the limestone was by means of blasting, and A. authorised the quarrying of the stone and the erection of lime kilns in the field. A nuisance was caused to the adjoining occupier by the blasting and by the smoke from the kilns, and he brought an action against both A. and B. On demurrer by A.:—Held, that he, the landlord, was liable, although the nuisance was actually created by the act of his tenant, because the terms of the demise were an authority from him to B. to create the nuisance, which was, therefore, the necessary consequence of the mode of occupation contemplated in the demise. *Harris v. James*, 45 L. J. Q. B. 545 ; *et per* Blackburn, J. :—‘In the present case, as I understand the averments, the field was let for the very purpose and object of being worked as a lime quarry, and for erecting lime kilns and burning lime. When, then, it is stated as a fact that the injury complained of arose from the natural and necessary consequence of carrying out this object, and as the result of lime getting and lime burning, then I think we must say that the landlord authorised the lime burning and the nuisance arising from it as being the necessary consequence of letting the field in the manner and with the objects described. In *Rich v. Basterfield*, 4 C. B. 483, the Court of Common Pleas came to a conclusion of fact which authorised their conclusion upon the case. There, a former occupier of the premises where the chimney was used to burn coke in the fire, and caused no smoke which could be at all injurious to the plaintiff ; and the judgment proceeded on that ground, as is evident from the following passage :—‘It being therefore quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance, it seems impossible to say that the tenant was in any sense the servant or agent of the defendant, in doing the acts complained of. The utmost that can be imputed to the defendant is, that he enabled the tenant to make fires if he pleased.’ Assuming that the evidence really did establish the facts which the Common Pleas thought it did, and if it was not the necessary consequence of burning fires in the chimney that there should be smoke, I have no fault to find with the decision ; but then, this case is not the same, because the fifth paragraph finds that the injury arising from the smoke and vapour is the natural and necessary consequence of the use of the land, and the plaintiff must therefore have judgment upon the demurrer to that paragraph.’ Page 441.

A public highway ran along the slope of a hill, beneath which was a valley, the slope being at right angles to the valley, and very precipitous. A landslip of considerable magnitude occurred on the slope, and about 252 yards of the highway were carried off into the valley below, and its Page 459.

Page 474.

place being filled up with stones and other débris, no trace of the old metalled road remained, but the line of it was known and admitted. An engineer, who had inspected the *locus in quo*, reported that it was practicable to form a permanent and passable road along the whole track, and of a similar character, at a moderate outlay. The Court had power to draw inferences of fact :—Held, that there was no such total destruction of the road as would relieve the parish from liability to repair. The *Queen v. Hornsea* (23 L. J. R. M. C. 59), distinguished. *R. v. Greenhow, Inhab. of* (45 L. J. M. C., 141.)

Defendant had a lamp projecting from his premises over a footway in a street. It fell on the plaintiff, who was passing underneath, and injured her. Defendant had shortly before employed a competent person, C., to put the lamp in good repair, but at the time it fell it was, though not to his knowledge, in a dangerous and decayed state. The jury found there was no personal negligence in the defendant, but there was negligence in C. :—Held, by Lush, J., and Quain, J., that it was the absolute duty of the defendant, as occupier of the premises having a lamp in such a position, to prevent its becoming dangerous to the public ; that if, in fact, it did become dangerous, it was a nuisance, and for any injury caused by such nuisance defendant was liable ; and that he could not shift the liability arising from such a duty from himself by having employed a competent person to do the necessary repairs. By Blackburn, J., ‘that as the defendant in this case had express knowledge shortly before the injury of the lamp needing repair, he was then bound to put it into reasonable repair ; and was liable for the consequences of its not being in repair, arising from the breach of duty in the person, however competent, whom he had employed ; it was therefore not necessary to decide, and *quære*, whether, if the danger arose from a latent defect, or from the act of a wrong doer without defendant’s knowledge, he would be liable for an injury so happening.’ *Tarry v. Ashton*, 45 L. J. Q. B. 260.

Page 562.

By the ‘Epping Forest Amendment Act, 1872,’ sect. 5, the Epping Forest commissioners may make orders prohibiting, until after their final report, any enclosure or waste of land within the forest, subject in their judgment to any forestal or common rights. The commissioners made a general order prohibiting all persons from committing waste upon a piece of land described until the final report, or until further order ; all persons affected to be at liberty to apply to them as there might be occasion. The defendant applied to the commissioners by counsel as a person affected, but they refused to enter into the question raised. The defendant was convicted upon an indictment moved by *certiorari* for breach of this order :—Held, upon a case stated, that the order and the indictment were good. *R. v. Walker*, 13 Cox, C. C. 94.

Page 647.

Add to note (h)—*R. v. Handley*, 13 Cox, C. C. 79.

Page 721.

C. was summoned for trespassing in pursuit of coney. He absconded, and a warrant was issued for his apprehension, addressed to all peace officers in the county of Devon. A constable in the county police force endeavoured to arrest C. at a time when he had not the warrant in his possession. C. resisted and assaulted the constable :—Held, ‘that as the offence with which C. was charged was not felony, C. was justified in resisting the attempt of the constable to arrest him without having the warrant in his possession.’ *Cod v. Cabe*, 45 L. J. M. C. 101 ; 13 Cox, C. C. 202.

## ADDENDA ET CORRIGENDA

TO

## VOLUME II.

Add to note (r)—The following document was held to be a valuable security within this section : ‘London, July 19, 1875, I hereby agree to pay you 100*l.* sterling, on the the 27th instant, to prevent any action against me.’ *R. v. John*, 13 Cox, C. C. 100, Brett, J. Page 81.

Whilst in treaty with Messrs. G. and P. for the sale and transfer of a public-house license, the prisoner was required by them to give security for the purchase money before they would assist him in procuring a transfer. To enable him to give the required security, the prosecutor accepted three bills of exchange drawn upon him by the prisoner, which the latter was to deposit with Messrs. G. and P. by way of security, and not negotiate or use for any other purpose, and if the transfer was not effected, was to return them to the prosecutor. The prisoner, instead of depositing them with Messrs. G. and P., converted two of them to his own use:—Held, that the prisoner was not an ‘agent’ within the 75th sect., nor a ‘bailee’ within the 3rd sect. of 24 & 25 Vict. c. 96, and could not be convicted under either. *R. v. Cosser*, 13 Cox, C. C. 187, Bramwell, B. Page 390.

The 16 & 17 Vict. c. 107, s. 95, is repealed by the 39 & 40 Vict. c. 36, noticed *post*, p. 692. Page 402.

See 39 & 40 Vict. c. 36, ‘The Customs Consolidation Act, 1876,’ Page 786. noticed *post*, p. 692.

The 6 & 7 Will. 4, c. 85, s. 38, is repealed by the 37 & 38 Vict. c. 35. Page 811. See vol. 3, p. 28.

Seventh line from top, insert ‘c. 97,’ instead of ‘c. 17.’ Page 927.

## ADDENDA TO VOLUME III.

Page 115.

The defendants were indicted, as directors and promoters of a certain company called the Eupion Fuel and Gas Company, Limited, for conspiring to induce the committee of the Stock Exchange to order a quotation of the shares of the company in their official list, 'and thereby to induce and persuade divers of the liege subjects of our Lady the Queen, who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed and constituted, and had in all respects complied with the rules and regulations of the . . . said Stock Exchange, so as to entitle the said company to have their shares quoted in the official list of the said Stock Exchange;—Held, that the indictment disclosed an indictable offence, *The King v. De Berenger* discussed and followed. *R. v. Aspinall*, 45 L. J. M. C. 129.

## APPENDIX OF STATUTES.

7 & 8 GEO. 4, c. 28.

*An Act for further improving the Administration of Justice in Criminal Cases in England.*

[21st June, 1827.]

‘Whereas trials for criminal offences in that part of the United Kingdom called England are attended with some forms which frequently impede the due administration of justice, and it is therefore expedient to abolish such forms, and also to abolish the benefit of clergy, and to make better provision for the punishment of offenders in certain cases :’ be it therefore enacted by, &c., that if any person, not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of ‘Not guilty,’ he shall by such plea, without any further form, be deemed to have put himself upon the country for trial; and the court shall, in the usual manner, order a jury for the trial of such person accordingly.

A plea of ‘Not guilty,’ without more, shall put the prisoner on his trial by jury.

2. If any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of ‘Not guilty’ on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

If he refuses to plead, court may order a plea of ‘Not guilty’ to be entered.

3. If any person, indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge in any of the said cases, every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.

Every challenge beyond the legal number shall be void.

4. No plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.

Attainder of another crime not pleadable.

5. Where any person shall be indicted for treason or felony, the jury empanelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

Jury shall not inquire of prisoner’s lands, &c., nor whether he fled.

6. Benefit of clergy, with respect to persons convicted of felony, shall be abolished; but that nothing herein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of this Act.

Benefit of clergy abolished.

7. No person convicted of felony shall suffer death unless it be for some felony which was excluded from the benefit of clergy before or on the first day of the present session of Parliament, or which hath been or shall be made punishable with death by some statute passed after that day.

What felonies only shall be capital.

Felonies not capital punishable under the Acts, if any relating thereto; otherwise under this Act.

The court may order hard labour or solitary confinement as part of the sentence of imprisonment.

Punishment for a subsequent felony.

Form of indictment for the subsequent felony.

What shall be sufficient proof of the first conviction.

Uttering false certificate of conviction.

Admiralty offences.

8. Every person convicted of any felony, not punishable with death, shall be punished in the manner prescribed by the statute or statutes specially relating to such felony; and that every person convicted of any felony, for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

9. And with regard to the place and mode of imprisonment for all offences punishable under this Act, be it enacted, that where any person shall be convicted of any offence punishable under this Act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour as to the court in its discretion shall seem meet.

10. See vol. i. p. 81.

11. And whereas it is expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, whether such conviction shall have taken place before or after the commencement of this Act; be it therefore enacted, that if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and in an indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy shall utter a false certificate of any indictment and conviction for a previous felony, or if any person other than such clerk, officer, or deputy shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony, and, being lawfully convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

12. All offences prosecuted in the High Court of Admiralty of England shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land.



13. Where the King's Majesty shall be pleased to extend his royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the Great Seal for such offender, as to the felony for which such pardon shall be so granted : provided always, that no free pardon, nor any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon.

Effect of a free or conditional pardon to a convict.

Proviso.

14. Wherever this or any other statute relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence or the subject-matter on or with respect to which it shall be committed, or the offender or the party affected or intended to be affected by the offence, hath used or shall use words importing the singular number or the masculine gender only, yet the statute shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction ; and wherever any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where such body shall be the party aggrieved.

Rule for the interpretation of all criminal statutes.

16. Nothing herein contained shall extend to Scotland or Ireland.

Not to extend to Scotland or Ireland.

# 1 VICT. c. 84, (a).

1. Recites the 2 & 3 Will. 4, c. 59, s. 19 [see vol. 2, p. 813], the 2 & 3 Will. 4, c. 125, s. 64 [see vol. 2, p. 793], the 5 & 6 Will. 4, c. 45, s. 12 [see vol. 2, p. 793], and the 5 & 6 Will. 4, c. 51, s. 5 [see vol. 2, p. 793] ; and enacts, that if any person shall after the commencement of this Act be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years.

Persons convicted of any of the offences hereinbefore mentioned to be liable to be transported.

The Acts recited in sec. 2 are repealed by the 8 & 9 Vict. c. 84, and 24 & 25 Vict. c. 95.

3. And be it enacted, that when any person shall be convicted of any offence punishable under this Act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

Persons convicted of offences punishable by imprisonment may be kept to hard labour and to solitary confinement.

(a) The 37 & 38 Vict. c. 35 (the Statute Law Revision Act, 1874), repeals this Act in part ; namely,

So much as relates to the punishment of offences formerly punishable under the Acts 11 Geo. 4 & 1 Will. 4, c. 66, 5 & 6 Will. 4, c. 45, or 3 & 4 Will. 4, c. 51.

Also, except as to Scotland, so much as relates to the punishment of offences formerly punishable under the Acts 2 & 3 Will. 4, c. 123 or 3 & 4 Will. 4, c. 44.

Section four from "or in an Act" to the end of that section.

Section Five.

5 &amp; 6 VICT. c. 38. (b)

*An Act to define the Jurisdiction of Justices in General and Quarter Sessions of the Peace.*

[30th June, 1842.]

‘Whereas it is expedient that the powers of justices in general and quarter sessions of the peace with respect to the trial of offences be better defined;’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that after the passing of this Act neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable [by transportation beyond the seas] (c) for life, or for any of the following offences (that is to say):—

Justices in sessions restrained from trying certain offences.

1. Misprision of treason :
2. Offences against the Queen’s title, prerogative, person, or government, or against either House of Parliament :
3. Offences subject to the penalties of præmunire :
4. Blasphemy, and offences against religion :
5. Administering or taking unlawful oaths :
6. Perjury and subornation of perjury :
7. Making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor :
8. Forgery :
9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern :
10. Bigamy, and offences against the laws relating to marriage :
11. Abduction of women and girls :
12. Endeavouring to conceal the birth of a child :
13. Offences against any provision of the laws relating to bankrupts and insolvents : (b)
14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels :
15. Bribery :
16. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person :
17. Stealing or fraudulently taking, or injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein :

(b) By 32 & 33 Vict. c. 62, s. 20, so much of this Act as excludes from the jurisdiction of justices and recorders at sessions of the peace, or adjournments thereof, the trial of persons for offences against any provision of the laws relating to bankrupts, is hereby repealed as from the passing of this Act; and any offence under this Act shall be deemed to be

within the jurisdiction of such justices and recorders.

By 37 & 38 Vict. c. 96, this Act (5 & 6 Vict. c. 38), is repealed in part; namely,—section one, the item of offences numbered 13, and from “provided” to the end of that section.

Section Five.

(c) Now penal servitude, see vol. 1, p. 73.

18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate or any interest in lands, tenements, or hereditaments :

Provided (d) always, that nothing herein contained shall be construed to give authority to the justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, to try any person or persons for any offence committed or alleged to be committed within the jurisdiction of the Central Criminal Court, which such justices are restrained from trying under the provisions of an Act passed in the fifth year of the reign of his late Majesty, intituled 'An Act for establishing a new court for the trial of offences committed in the metropolis and parts adjoining.'

Proviso as to justices acting in London and the environs.

4 & 5 Will. 4, c. 36.

## 6 &amp; 7 VICT. c. 12.

*An Act for the more convenient Holding of Coroners' Inquests.*

[11th April, 1843.]

'Whereas it often happens that it is unknown where persons lying dead have come by their deaths, and also that such persons may die in other places than those in which the cause of death happened : ' be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that the coroner only within whose jurisdiction the body of any person upon whose death an inquest ought to be holden shall be lying dead shall hold the inquest, notwithstanding that the cause of death did not arise within the jurisdiction of such coroner ; and in the case of any body found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea, where there shall be no deputy coroner for the jurisdiction of the Admiralty of England, the inquest shall be holden only by the coroner having jurisdiction in the place where the body shall be first brought to land.

Coroner only within whose jurisdiction the body is lying dead shall hold the inquest.

2. For the purpose of holding coroners' inquests every detached part of a county, riding, or division shall be deemed to be within that county, riding, or division by which it is wholly surrounded, or where it is partly surrounded by two or more counties, ridings, or divisions, within that one with which it has the longest common boundary.

Provision for detached parts of counties.

3. If a verdict of murder or manslaughter, or as accessory before the fact to any murder, shall be found by the jury at any such inquest, against any person or persons, the coroner holding the said inquest and the justices of oyer and terminer and gaol delivery for the county, city, district, or place in which such inquest shall be holden, and all other persons, shall have the same powers respectively for the commitment, trial, and execution of the sentence of the person or persons so charged as they now by law possess with regard to the commitment, trial, and execution of the sentence upon any person or persons committed and tried within the jurisdiction where the death happened.

Parties may be tried on verdicts of murder or manslaughter.

## 7 &amp; 8 VICT. c. 2.

See ss. 1 and 2, as to offences committed on the high seas, vol. 1, p. 16.  
3. The justice or justices by whom any information shall be taken

Where offenders shall be tried.

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(d) See note (b) ante, p. 640.

7 Geo. 4, c. 38.

touching any offence committed within the jurisdiction of the Admiralty of England under the provisions of an Act passed in the seventh year of the reign of King George the Fourth, intituled 'An Act to enable commissioners for trying offences upon the sea, and justices of the peace, to take examinations touching such offences, and to commit to safe custody persons charged therewith,' if he or they shall see cause thereupon to commit such person to take his trial for such offence, shall commit him to the same prison to which he would have been committed to take his trial at the next court of oyer and terminer and general gaol delivery if the offence had been committed on land within the jurisdiction of the same justice or justices, and shall have authority to bind by recognizance all persons who shall know or declare anything material touching the said offence to appear at the said next court of oyer and terminer and general gaol delivery, then and there to prosecute or give evidence against the party accused, and shall return all such informations and recognizances to the proper officer of the Court in which the trial is to be, at or before the opening of the court; and every such offender shall be arraigned, tried, and sentenced, as if the offence had been committed within the county, riding, or division for which such court shall be holden. See vol. 1, p. 16, note (r).

Not to affect  
Central  
Criminal  
Court, or pre-  
vent the issue  
of special com-  
missions.

4. Nothing herein contained shall affect the jurisdiction belonging to the Central Criminal Court for the trial of persons charged with offences committed on the high seas and other places within the jurisdiction of the Admiralty of England, or to restrain the issue of any special commission under the first recited Act for the trial of such offenders, if need shall be.

11 &amp; 12 VICT. c. 78.

*An Act for the further Amendment of the Administration of the  
Criminal Law.*

[31st August, 1848.]

Questions of  
law may be  
reserved at  
sessions of the  
peace for con-  
sideration of  
judges.

1. When any person shall have been convicted of any treason, felony, or misdemeanor before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be.

Questions re-  
served to be  
certified to  
the judges.

2. The judge or commissioner or court of quarter sessions shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons, and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the

party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require ; and such judgment and order, if any, of the said justices and barons, shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form ; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be ; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next court of oyer and terminer and gaol delivery or sessions of the peace shall vacate the recognizance of bail, if any ; and if the court of oyer and terminer and gaol delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next session.

3. The jurisdiction and authorities by this Act given to the said justices of either bench and barons of the exchequer shall and may be exercised by the said justices and barons, or five of them at the least, of whom the lord chief justice of the Court of Queen's Bench, the lord chief justice of the Court of Common Pleas, and the lord chief baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the exchequer chamber or other convenient place ; and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered.

4. The said justices and barons, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended.

5. Whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition.

6. Every person who shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any certificate of or copy certified by a chief justice, or any certificate of or copy certified by a clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned beyond the seas for any term

Quorum of judges ; their judgments to be delivered in open court.

Case or certificate may be sent back for amendment.

When judgment is reversed on writ of error, record may be remitted to court below for judgment.

Penalty for forgery.

not exceeding ten years, or be imprisoned for any term not exceeding three years, with or without hard labour and solitary confinement, both or either, at the discretion of the court before which he shall be tried.

## SCHEDULE.

Whereas at the session of the peace for the county of \_\_\_\_\_ held on \_\_\_\_\_ before \_\_\_\_\_ and others their fellows [or at the session of oyer and terminer and gaol delivery held for the county of \_\_\_\_\_ on \_\_\_\_\_ before, among others, Sir A. B., Knight, one of the justices of the court of \_\_\_\_\_ and \_\_\_\_\_ here name the *quorum commissioners*, justices of oyer and terminer and gaol delivery], A.B., late of \_\_\_\_\_ labourer, having been found guilty of felony, and judgment thereupon given, that [state the substance] the court before whom he was tried reserved a certain question of law for the consideration of the justices of either bench and the barons of the exchequer, and execution was thereupon respited in the meantime :

This is to certify, that the said justices and barons having met in the exchequer chamber at Westminster [or Dublin, as the case may be] on the \_\_\_\_\_ day of \_\_\_\_\_ it was considered by the said justices and barons there that the judgment aforesaid should be annulled, and an entry made on the record that the said A.B. ought not, in the judgment of the said justices and barons, to have been convicted of the felony aforesaid ; and you are therefore hereby required forthwith to discharge the said A.B. from your custody.

To the Gaoler of \_\_\_\_\_ and the Sheriff of \_\_\_\_\_ and all others whom it may concern.

(Signed) E.F.

Clerk of the Peace for the County of \_\_\_\_\_  
[or Clerk of Assize for \_\_\_\_\_  
as the case may be.]

16 & 17 VICT. c. 99.

Secs. 1, 2, 3, and 4 are repealed by the 20 & 21 Vict. c. 3.

Conditional pardons to be allowed with reference to the substituted punishment, as in cases of pardons on condition of transportation.

5. Whenever Her Majesty or the lord lieutenant, or other chief governor or governors of Ireland for the time being shall be pleased to extend mercy to any offender convicted of any offence for which he may be liable to the punishment of death, upon condition of his being kept to penal servitude for any term of years or for life, such intention of mercy shall have the same effect, and may be signified in the same manner, and all courts, justices, and others shall give effect thereto and to the condition of the pardon in like manner, as in the cases where Her Majesty, or the lord lieutenant, or other chief governor or governors of Ireland for the time is or are now pleased to extend mercy upon condition of transportation beyond seas, the order for the execution of such punishment as Her Majesty, or the lord lieutenant, or other chief governor or governors of Ireland for the time being may have made the condition of her, his, or their mercy being substituted for the order for transportation.

Persons under sentence or order of penal servitude, how to be dealt with.

6. Every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other prison in the United Kingdom,

or in any part of Her Majesty's dominions beyond the seas, or in any port or harbour thereof, as one of Her Majesty's principal secretaries of state may from time to time direct; and such person may during such term be kept to hard labour, and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with whilst so confined.

7. All Acts and provisions of Acts now applicable with respect to persons under sentence or order of transportation shall, so far as may be consistent with the express provisions of this Act, be construed to extend and be applicable to persons under any sentence or order of penal servitude under this Act; and all the powers and provisions contained in the Act of the fifth year of King George the Fourth, chapter eighty-four, authorizing the appointment by Her Majesty from time to time of places of confinement as therein mentioned for male offenders under sentence or order of transportation, and authorizing Her Majesty to order male offenders convicted in Great Britain and under sentence or order of transportation to be kept to hard labour in any part of Her Majesty's dominions out of England, shall extend and be applicable to and for the appointment by Her Majesty of like places of confinement in any part of the United Kingdom for offenders (whether male or female) sentenced under this Act in any part of the United Kingdom, and to and for the ordering of such offenders to be kept to hard labour in any part of Her Majesty's dominions out of England; and all the provisions of the said Act concerning the removal to or from and confinement in the places of confinement in or out of England, appointed under the said Act, of the offenders therein mentioned, and all Acts and provisions of Acts now in force concerning or relating to the regulation and government of such places of confinement, and the custody, treatment, management, and control of or otherwise in relation to the offenders confined therein, shall, so far as the same may be consistent with the express provisions of the Act, extend and be applicable to and for the removal to and from and confinement in the places of confinement appointed under this Act, of the offenders sentenced in any part of the United Kingdom, and otherwise be applicable to and in respect of such places of confinement and the offenders to be confined therein.

8. Provided always, that all the powers vested under this Act expressly or by reference to any other Act, in one of Her Majesty's principal secretaries of state, shall in relation to places of confinement in Ireland, or where such powers are otherwise to be exercised in Ireland, be exercised by the lord lieutenant or other chief governor or governors of Ireland; and where the signature of one of Her Majesty's principal secretaries of state would be necessary in relation to the exercise of such powers, the signature of such lord lieutenant or chief governor or governors, or his or their chief secretary, shall be sufficient in the case of the exercise of such powers by such lord lieutenant or chief governor or governors.

9. It shall be lawful for Her Majesty, by an order in writing under the hand and seal of one of Her Majesty's principal secretaries of state, to grant to any convict now under sentence of transportation, or who may hereafter be sentenced to transportation, or to any punishment substituted for transportation by this Act, a licence to be at large in the United Kingdom and the Channel Islands, or in such part thereof respectively as in such licence shall be expressed, during such portion of his or her term of transportation or imprisonment, and upon such conditions in all respects as to Her Majesty shall seem fit; and it shall be lawful for Her Majesty to revoke or alter such licence by a like order at Her Majesty's pleasure.

All Acts, &c. concerning convicts sentenced to transportation made applicable for the purposes of this Act.

Powers of secretary of state to be exercised in Ireland by lord lieutenant.

Her Majesty may grant licences to be at large to convicts under sentence of transportation.

10. So long as such licence shall continue in force and unrevoked

Holder of

licence not to be imprisoned, &c., by reason of his sentence.

If licence revoked, the convict may be apprehended and committed to prison.

such convict shall not be liable to be imprisoned or transported by reason of his or her sentence, but shall be allowed to go and remain at large according to the term of such licence.

11. If it shall please Her Majesty to revoke any such licence as aforesaid, it shall be lawful for one of Her Majesty's principal secretaries of state, by warrant under his hand and seal, to signify to any one of the police magistrates of the metropolis that such licence has been revoked, and to require such magistrate to issue his warrant under his hand and seal for the apprehension of the convict to whom such licence was granted, and such magistrate shall issue his warrant accordingly, and such warrant shall and may be executed by the constable to whom the same shall be delivered for that purpose in any part of the United Kingdom, or in the Isles of Jersey, Guernsey, Alderney, or Sark, and shall have the same force and effect in all the said places as if the same had been originally issued or subsequently endorsed by a justice of the peace or magistrate, or other lawful authority having jurisdiction in the place where the same shall be executed; and such convict when apprehended under such warrant shall be brought, as soon as he conveniently may be, before the magistrate by whom the said warrant shall have been issued, or some other magistrate of the same court, and such magistrate shall thereupon make out his warrant under his hand and seal for the recommitment of such convict [to the prison or place of confinement from which he was released by virtue of the said licence] (a) and such convict shall be so recommitment accordingly, and shall thereupon be remitted to his or her original sentence, and shall undergo the residue thereof as if no such licence had been granted.

12 is repealed by the 24 & 25 Vict. c. 95.

Queen's prerogative.

13. Nothing in this Act contained shall in any manner affect Her Majesty's royal prerogative of mercy, or any prerogative of mercy vested in the lord lieutenant or other chief governor or governors of Ireland for the time being.

Discretion of courts as to alternative punishments not to be affected.

14. Nothing herein contained shall interfere with or affect the authority or discretion of any court in respect of any punishment which such court may now award or pass on any offender other than transportation, but where such other punishment may be awarded at the discretion of the court, instead of transportation, or in addition thereto, the same may be awarded instead of or (as the case may be) in addition to the punishment substituted for transportation under this Act.

Transportation.

15. For the purposes of this Act, the term 'Transportation' shall include banishment beyond the seas.

20 & 21 VICT. c. 3.

*An Act to amend the Act of the Sixteenth and Seventeenth Years of Her Majesty, to substitute in certain Cases other Punishment in lieu of Transportation.*

[26th June, 1857.]

Sec. 1 repeals secs. 1, 2, 3, and 4 of the 16 & 17 Vict. c. 99.

Sentence of transportation abolished, and sentence of penal servitude substituted.

2. After the commencement of this Act, no person shall be sentenced to transportation; and any person who, if this Act and the said Act had not been passed, might have been sentenced to transportation, shall, after the commencement of this Act, be liable to be sentenced to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said Act and

(a) The part within brackets is repealed by the 37 & 38 Vict. c. 66, the Statute Law Revision Act, 1875.



this Act had not been passed ; and in every case where, at the discretion of the court, one of any two or more terms of transportation might have been awarded, the court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorized to be awarded instead of such terms of transportation : provided always, that any person who might, at the discretion of the court, have been sentenced either to transportation for any term, or to any period of imprisonment, shall be liable, at the discretion of the court, to be sentenced either to penal servitude for the same term, or to the same period of imprisonment ; and in any case in which before the passing of the said Act sentence of seven years' transportation might have been passed, it shall be lawful for the court in its discretion to pass a sentence of penal servitude of not less than three years.

3. 'And whereas the provisions applicable to persons under sentence of transportation extend to persons under sentence of penal servitude conveyed to parts beyond the seas in those cases only where they are conveyed to and kept in places of confinement appointed under the said Act, or the Act of the fifth year of King George the Fourth, chapter eighty-four, and it is expedient to extend the said provisions to other cases :'

Any person now or hereafter under sentence or order of penal servitude may, during the term of the sentence or order, be conveyed to any place or places beyond the seas to which offenders under sentence or order of transportation may be conveyed, or to any place or places beyond the seas which may be hereafter appointed as herein mentioned ; and all Acts and provisions now applicable to and for the removal and transportation of offenders under sentence or order of transportation to and from any places beyond the seas, and concerning their custody, management, and control, and the property in their services, and the punishment of such offenders if at large without lawful cause before the expiration of their sentence, and all other provisions now applicable to and in the case of persons under sentence or order of transportation, shall apply to and in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation.

4. The provisions and powers of the said Act of the fifth year of King George the Fourth, authorizing the appointment (by Her Majesty, with the advice of Her privy council) of any place or places beyond the seas to which felons and other offenders under sentence or order of transportation shall be conveyed, and all other powers of Her Majesty, or the lord lieutenant or chief governor or governors of Ireland, for the like purpose, shall extend and be applicable to and for the appointment of any place or places beyond the seas to which offenders under sentence or order of penal servitude may be conveyed, as herein provided.

5. 'And whereas by the said Act of the sixteenth and seventeenth years of Her Majesty it is provided, that any convict whose licence is revoked shall be recommitted to the prison or place of confinement from which he was released by virtue of the said licence ;' be it enacted, that from and after the passing of this Act, any such convict may be recommitted by the magistrate issuing his warrant in that behalf, either to the prison from which he was released by virtue of his licence, or to any other prison in which convicts under sentence of penal servitude may be lawfully confined.

6. Where in any enactment now in force the expression 'any crime punishable with transportation,' or 'any crime punishable by law with transportation,' or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude.

Provisions of Acts concerning transported offenders to apply to offenders under sentence of penal servitude.

Existing power to appoint places of transportation to be applicable for the purposes of this Act.

Magistrates may recommit convicts whose licences are revoked to penal servitude in any convict prison.

All enactments referring to transportation to have reference to penal servitude.

Recited Act  
and this to be  
read as one.

7. The said Act of the sixteenth and seventeenth years of Her Majesty and this Act shall be read and construed together as one Act.

24 & 25 VICT. c. 94.

*An Act to consolidate and amend the Statute Law of England and Ireland relating to Accessories to and Abettors of Indictable Offences.*

[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to accessories to and abettors of indictable offences;’ be it enacted by, &c., as follows :

As to accessories before the fact :

Accessories  
before the fact  
may be tried  
and punished  
as principals.

1. Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.

Accessories  
before the fact  
may be in-  
dicted as such,  
or as substan-  
tive felons.

2. Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of an Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.

As to accessories after the fact :

Accessories  
after the fact  
may be in-  
dicted as such,  
or as substan-  
tive felons.

3. Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.

Punishment of  
accessories  
after the fact.

4. Every accessory after the fact to any felony (except where it is otherwise specially enacted), whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable, at the discretion of the court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour, and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to such punishment: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

As to accessories generally :

Prosecution of  
accessory after  
principal has  
been con-  
victed, but not  
attainted.

5. If any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainer, and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted.

Several acces

6. Any number of accessories at different times to any felony, and

any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

7. Where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the Act by reason whereof such person shall have become such accessory shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without: provided that no person who shall be once duly tried either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence.

As to abettors in misdemeanors:

8. Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

As to other matters:

9. Where any person shall, within the jurisdiction of the Admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed 'on the high seas;' provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

10. Nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.

11. This Act shall commence and take effect on the first day of November, one thousand eight hundred and sixty-one.

sories may be included in the same indictment, although principal felon not included.

Trial of accessories.

Abettors in misdemeanors.

As to offences committed within the jurisdiction of the Admiralty.

Act not to extend to Scotland.

Commencement of Act.

Acts and parts of Acts have been consolidated and amended, and it is expedient to repeal the enactments so consolidated and amended, and certain other enactments: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Repeal of Acts and parts of Acts mentioned in schedule.

1. The several Acts and parts of Acts in the schedule hereto annexed shall continue in force until and throughout the last day of October in the present year, and shall from and after that day be repealed to the extent following (that is to say) : in any case where the enactment does not form part of the law of Scotland, then the enactment shall be wholly repealed, but in any case where the enactment does form part of the law of Scotland, then the enactment shall be wholly repealed as to every other place, but shall not be repealed as to Scotland, unless otherwise expressly mentioned.

Repeal not to affect the colonies in certain cases.

2. Provided, that where any enactment shall have been extended to any part of Her Majesty's dominions out of the United Kingdom by any Act of the Parliament of the United Kingdom or otherwise, the same shall not be repealed as to that part of Her Majesty's dominions.

Repeal not to affect offences, &c., committed before the commencement of this Act.

3. Provided also, that every offence which shall have been wholly or partly committed against any of the said Acts or parts of Acts before this Act comes into operation shall be dealt with, inquired of, tried, determined, and punished, and every penalty in respect of any such offence shall be recovered, in the same manner as if the said Acts and parts of Acts had not been repealed; and that every Act duly done, and every warrant and other instrument duly made or granted before this Act comes into operation, shall continue and be of the same force and effect as if the said Acts and parts of Acts had not been repealed; and that every right, liability, privilege, and protection in respect of any matter or thing committed or done before this Act comes into operation shall continue and be of the same force and effect as if the said Acts and parts of Acts had not been repealed; and that every action, prosecution, and other proceeding which shall have been commenced before this Act comes into operation, or shall thereafter be commenced in respect of any such matter or thing, may be prosecuted, continued, and defended in the same manner as if the said Acts and parts of Acts had not been repealed.

Repeal not to affect any authority to amend registers of births, &c.

4. Provided also, that nothing herein contained shall in any manner alter or affect any power or authority given by any Act to alter or amend any register of births, baptisms, marriages, deaths, or burials.

#### THE SCHEDULE.

References to Act.	Extent of Repeal.
10 C. 1, Sess. 3, c. 20 (I)	The whole.
7 W. 3, c. 18 (I) ... ..	Section Four.
2 & 3 Ann. c. 4 ... ..	So much of Section Nineteen as relates to any forging or counterfeiting therein mentioned.
6 Ann. c. 2 (I) ... ..	So much of Section Seventeen as relates to any forging or counterfeiting therein mentioned.
6 Ann. c. 35 ... ..	So much of Section Twenty-six as relates to any forging or counterfeiting therein mentioned.

References to Act.	Extent of Repeal.
7 Ann. c. 20 ... ..	So much of Section Fifteen as relates to any forging or counterfeiting therein mentioned.
8 Ann. c. 10 (I) ... ..	So much of Section Four as relates to any forging or counterfeiting therein mentioned.
8 Geo. 1, c. 15 (I) ... ..	So much of Section Four as relates to any forging or counterfeiting therein mentioned.
11 Geo. 1, c. 9 ... ..	Section Six.
12 Geo. 1, c. 32 ... ..	Section Nine.
3 Geo. 2, c. 4 (I) ... ..	Section One.
8 Geo. 2, c. 6 ... ..	So much of Section Thirty-one as relates to any forging or counterfeiting therein mentioned.
15 Geo. 2, c. 13 ... ..	Section Twelve.
17 Geo. 2, c. 11 (I) ... ..	Section One.
13 & 14 Geo. 3, c. 14 (I) ... ..	The whole.
21 & 22 Geo. 3, c. 16 (I) ... ..	Sections Fifteen and Sixteen.
23 & 24 Geo. 3, c. 22 (I) ... ..	Sections Twenty-two.
25 Geo. 3, c. 37 (I) ... ..	The whole.
27 Geo. 3, c. 15 (I) ... ..	Section Five.
35 Geo. 3, c. 66 ... ..	Section Three and all the subsequent Sections.
37 Geo. 3, c. 26 (I) ... ..	The whole.
37 Geo. 3, c. 46 ... ..	Section Three and all the subsequent Sections.
37 Geo. 3, c. 54 (I) ... ..	Section Eleven and all the subsequent Sections.
37 Geo. 3, c. 126 ... ..	The whole, both as to England and Scotland, except Section One.
38 Geo. 3, c. 53 (I) ... ..	The whole.
39 Geo. 3, c. 63 (I) ... ..	The whole, except the last Section.
40 Geo. 3, c. 96 (I) ... ..	So much of Section Five as perpetuates the part of the 27 Geo. 3, c. 15, hereby repealed.
41 Geo. 3, c. 57 ... ..	The whole.
43 Geo. 3, c. 139 ... ..	Sections One and Two as to Ireland, and the rest of the Act as to the whole United Kingdom.
48 Geo. 3, c. 1 ... ..	Section Nine.
49 Geo. 3, c. 13 (I) ... ..	The whole.
1 Geo. 4, c. 4 ... ..	The whole.
1 Geo. 4, c. 92 ... ..	Sections One and Two.
3 Geo. 4, c. 116 ... ..	So much of Section Seven as relates to any forging or counterfeiting therein mentioned.
4 Geo. 4, c. 54 ... ..	The whole.
5 Geo. 4, c. 25 (I) ... ..	Section Five.
7 Geo. 4, c. 64 ... ..	Sections Nine, Ten, and Eleven.
7 & 8 Geo. 4, c. 18 ... ..	The whole.
7 & 8 Geo. 4, c. 29 ... ..	The whole, as to the whole United Kingdom.
7 & 8 Geo. 4, c. 30 ... ..	The whole.

References to Act.	Extent of Repeal.
9 Geo. 4, c. 31 ... ..	The whole.
9 Geo. 4, c. 54 (I) ... ..	Sections Twenty-three, Twenty-four, and Twenty-five.
9 Geo. 4, c. 55 (I) ... ..	The whole, as to the whole United Kingdom.
9 Geo. 4, c. 56 (I) ... ..	The whole.
10 Geo. 4, c. 34 (I) ... ..	The whole.
11 Geo. 4 & 1 W. 4, c. 66	The whole, except Section Twenty-one.
2 & 3 W. 4, c. 4 ... ..	The whole.
2 & 3 W. 4, c. 34 ... ..	The whole, as to the whole United Kingdom.
2 & 3 W. 4, c. 75 ... ..	Section Sixteen.
2 & 3 W. 4, c. 123 ... ..	The whole.
3 & 4 W. 4, c. 44 ... ..	The whole.
4 & 5 W. 4, c. 26 ... ..	Section Two.
5 & 6 W. 4, c. 34 (I) ...	The whole.
5 & 6 W. 4, c. 81 ... ..	So much as relates to the punishment of any person who shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel in any church or chapel, shall break out of the same, and to principals in the second degree and accessories in such offences.
6 & 7 W. 4, c. 4 ... ..	So much as alters and amends that part of the 5 & 6 Will. 4, c. 81, which is hereby repealed.
6 & 7 W. 4, c. 30 ... ..	The whole.
6 & 7 W. 4, c. 86 ... ..	Section Forty-three.
7 W. 4 & 1 Vict. c. 77 ...	So much of Section Three as empowers the court to direct sentence of death to be recorded in cases of murder.
7 W. 4 & 1 Vict. c. 84 ...	So much of Sections One and Three as relates to the forging, altering, offering, uttering, disposing of, or putting off any will, testament, codicil, or testamentary writing, or any power of attorney, or other authority therein mentioned, and to principals in the second degree and accessories before the fact in such offences, and so much of Sections Two and Three as relates to the punishment of any offence created by or formerly punishable under any enactment in this schedule before mentioned and hereby repealed.
7 W. 4 & 1 Vict. c. 85 ...	The whole.
7 W. 4 & 1 Vict. c. 86 ...	The whole.
7 W. 4 & 1 Vict. c. 87 ...	The whole.
7 W. 4 & 1 Vict. c. 89 ...	The whole.
7 W. 4 & 1 Vict. c. 90 ...	The whole, except Section Five.
2 & 3 Vict. c. 58 ... ..	Section Ten.
3 & 4 Vict. c. 97 ... ..	Section Fifteen.
4 & 5 Vict. c. 56 ... ..	Sections Two and Three, and so much of

References to Act.	Extent of Repeal.
5 & 6 Vict. c. 28 (I) ...	<p>Section One as relates to embezzlements by officers or servants of the bank of England.</p> <p>Sections Four, Thirteen, Fourteen, and Fifteen, and so much of Section Seven as alters the punishment contained in any enactment hereby repealed, and so much of Section Eighteen as relates to principals in the second degree and accessories before the fact to any offence mentioned in the said Sections Four, Thirteen, Fourteen, and Fifteen, or in the said part of the said Section Eighteen hereby repealed.</p>
5 & 6 Vict. c. 39 ...	Section Six.
5 & 6 Vict. c. 66 ...	Sections Nine and Ten.
5 & 6 Vict. c. 106 (I) ...	Sections Eleven and Twelve.
6 & 7 Vict. c. 10 ...	The whole.
7 & 8 Vict. c. 62 ...	The whole.
7 & 8 Vict. c. 81 (I) ...	Section Seventy-five.
8 & 9 Vict. c. 44 ...	The whole.
8 & 9 Vict. c. 47 ...	The whole.
8 & 9 Vict. c. 108 (I) ...	Section Eighteen.
9 & 10 Vict. c. 25 ...	The whole.
10 & 11 Vict. c. 66 ...	The whole.
11 & 12 Vict. c. 46 ...	Sections One, Two, and Three.
12 & 13 Vict. c. 11 ...	The whole.
12 & 13 Vict. c. 76 ...	The whole.
13 & 14 Vict. c. 72 (I) ...	Section Sixty-two.
13 & 14 Vict. c. 88 (I) ...	Section Forty-two.
14 & 15 Vict. c. 11 ...	Sections One, Two, Six, and Seven.
14 & 15 Vict. c. 19 ...	Sections One, Two, Three, Four, Six, Seven, Eight, and Nine.
14 & 15 Vict. c. 92 (I) ...	Sections Two, Three, Four, and Five.
14 & 15 Vict. c. 100 ...	<p>Sections Four, Six, Eight, Eleven, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, and so much of Section Five as relates to forging or uttering any instrument, and so much of Section Twenty-nine as relates to any indecent assault, or any assault occasioning actual bodily harm, or any attempt to have carnal knowledge of a girl under twelve years of age.</p>
16 & 17 Vict. c. 23 ...	Section Forty-one.
16 & 17 Vict. c. 30 ...	Section One.
16 & 17 Vict. c. 99 ...	Section Twelve.
16 & 17 Vict. c. 102 ...	The whole, as to the whole United Kingdom.
16 & 17 Vict. c. 113 ...	<p>So much of Section Seventy-one as relates to any action which shall be commenced against any person for anything done in pursuance of any of the Acts of this Session for consolidating and amend-</p>

References to Act.	Extent of Repeal.
	ing the Statute Law of England and Ireland relating to Larceny, Malicious Injuries, and Coin.
16 & 17 Vict. c. 132 ...	Sections Ten and Eleven.
17 & 18 Vict. c. 33 ...	Section Six.
20 & 21 Vict. c. 54 ...	The whole.
21 & 22 Vict. c. 3 ...	Section Ten.
21 & 22 Vict. c. 47 ...	The whole.
21 & 22 Vict. c. 79 ...	Section Three.
21 & 22 Vict. c. 106 ...	Section Fifty.
22 Vict. c. 11 ...	Section Ten.
22 & 23 Vict. c. 32 ...	Section Twenty-five.
22 & 23 Vict. c. 39 ...	Section Thirteen.
23 & 24 Vict. c. 8 ...	The whole.
23 & 24 Vict. c. 29 ...	The whole.
23 & 24 Vict. c. 130 ...	Section Thirteen.

## 24 &amp; 25 VICT. C. 96.

*An Act to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar Offences.*

[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences:’ be it enacted by, &c., as follows:—

## 1. In the interpretation of this Act :

Interpretation  
of terms :

‘Document of  
title to goods:’

The term ‘document of title to goods’ shall include any bill of lading, India warrant, dock warrant, warehouse keeper’s certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to :

‘Document of  
title to lands:’

The term ‘document of title to lands’ shall include any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate :

‘Trustee:’

The term ‘trustee’ shall mean a trustee on some express trust created by some deed, will, or instrument in writing, and shall include the heir, or personal representative, of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer, acting under any present or future Act relating to joint-stock companies, bankruptcy, or insolvency :

‘Valuable security:’

The term ‘valuable security’ shall include any order, exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United



Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore defined :

The term 'property' shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include, not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and any thing acquired by such conversion or exchange, whether immediately or otherwise :

For the purposes of this Act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day.

2. Every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the twenty-first day of June, one thousand eight hundred and twenty-seven ; and every court whose power as to the trial of larceny was before that time limited to petty larceny shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny.

All larcenies to be of the same nature.

3. Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny ; but this section shall not extend to any offence punishable on summary conviction.

Bailees fraudulently converting property guilty of larceny.

4. Whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Punishment for simple larceny.

5. It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them.

Three larcenies within six months may be charged in one indictment.

6. If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings ; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings.

Where a single taking is charged, and several takings at different times are proved.

7. Whosoever shall commit the offence of simple larceny after a previous conviction for felony, whether such conviction shall have taken

Larceny after a conviction for felony.

place upon an indictment, or under the provisions of the Act passed in the session held in the eighteenth and nineteenth years of Queen Victoria, chapter one hundred and twenty-six, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Larceny after conviction of an indictable misdemeanor under this Act.

8. Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable, like simple larceny, after having been previously convicted of any indictable misdemeanor punishable under this Act, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Larceny after two summary convictions.

9. Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in the Act of the session held in the seventh and eighth years of King George the Fourth, chapter twenty-nine, or the Act of the same session, chapter thirty, or the Act of the ninth year of King George the Fourth, chapter thirty-five, or the Act of the same year, chapter fifty-six, or the Act of the session held in the tenth and eleventh years of Queen Victoria, chapter eighty-two, or the Act of the session held in the eleventh and twelfth years of Queen Victoria, chapter fifth-nine, or in sections three, four, five, and six of the Act of the session held in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-two, or in this Act, or the Act of this session, intituled An Act to consolidate and amend the Statute Law of England and Ireland relating to Malicious Injuries to Property (whether each of the convictions shall have been in respect of an offence of the same description or not, and whether such convictions or either of them shall have been or shall be before or after the passing of this Act), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

7 & 8 Geo. 4, cc. 29, 30.

9 Geo. 4, cc. 55, 56.

10 & 11 Vict. c. 82.

11 & 12 Vict. c. 59.

14 & 15 Vict. c. 92.

24 & 25 Vict. c. 97.

Sects. 10 to 97 inclusive, will be found in vol. 2. See Table of Statutes at commencement of 2nd vol.

Principals in the second degree and accessories.

98. In case of every felony punishable under this Act every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except only a receiver of stolen property) shall, on conviction, be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be indicted and punished as a principal offender.

Abettors in offences punishable on summary conviction.

99. Whosoever shall aid, abet, counsel, or procure the commission of any offence which is by this Act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction before a justice of the peace, be liable for every first, second, or subsequent offence of aiding,

abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is by this Act made liable.

100. See vol. 1, p. 183.

101. See vol. 2, p. 489.

102. See vol. 2, p. 492.

As to apprehension of offenders, and other proceedings :

103. Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this Act, except only the offence of angling in the day-time, may be immediately apprehended without a warrant by any person, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law ; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence, punishable either upon indictment or upon summary conviction by virtue of this Act, shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods ; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized, and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.

104. Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law.

105. Where any person shall be charged on the oath of a credible witness before any justice of the peace with any offence punishable on summary conviction under this Act, the justice may summon the person charged to appear at a time and place to be named in such summons, and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode), the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person, and bringing him before himself or some other justice of the peace ; or the justice before whom the charge shall be made may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant, and the justice before whom the person charged shall appear or be brought shall proceed to hear and determine the case.

106. Every sum of money which shall be forfeited on any summary conviction for the value of any property stolen or taken, or for the amount of any injury done (such value or amount to be assessed in each case by the convicting justice), shall be paid to the party aggrieved, except where he is unknown, and in that case such sum shall be applied in the same manner as a penalty ; and every sum which shall be imposed as a penalty by any justice of the peace whether in addition to such value or amount or otherwise, shall be paid and applied in the same manner as other penalties recoverable before justices of the peace are to be paid and applied in cases where the statute imposing the same contains no direction for the payment thereof to any person : provided, that where several persons shall join in the commission of the same offence,

A person in the act of committing any offence may be apprehended without a warrant.

Justice, upon grounds of suspicion proved on oath, may grant a search warrant.

Person to whom stolen property is offered may seize the party offering it.

A person loitering at night and suspected of any felony against this Act may be apprehended.

Mode of compelling the appearance of persons punishable on summary conviction.

Application of forfeitures and penalties on summary convictions.

Proviso where several persons join in

commission of  
same offence.

and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the value of the property or to the amount of the injury, in every such case no further sum shall be paid to the party aggrieved than such value or amount; and the remaining sum or sums forfeited shall be applied in the same manner as any penalty imposed by a justice of the peace as hereinbefore directed to be applied.

If a person  
summarily  
convicted shall  
not pay, &c.  
the justice  
may commit  
him.

107. In every case of a summary conviction under this Act, where the sum which shall be forfeited for the value of the property stolen or taken, or for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid, either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the convicting justice (unless where otherwise specially directed) may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two months, where the amount of the sum forfeited or of the penalty imposed, or of both (as the case may be), together with the costs, shall not exceed five pounds, and for any term not exceeding four months where the amount, with costs, shall not exceed ten pounds, and for any term not exceeding six months in any other case, the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

Justice may  
discharge the  
offender in  
certain cases.

108. Where any person shall be summarily convicted before a justice of the peace of any offence against this Act, and it shall be a first conviction, the justice may, if he shall so think fit, discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.

A summary  
conviction  
shall be a bar  
to any other  
proceeding  
for the same  
cause.

109. In case any person convicted of any offence punishable upon summary conviction by virtue of this Act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or from the lord lieutenant or other chief governor in Ireland, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment adjudged in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.

Appeal.

110. In all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction for the county or place wherein the cause of complaint shall have arisen: provided, that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or shall enter into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; or if such appeal shall be against any conviction, whereby only a penalty or other sum of money shall be adjudged to be paid, shall deposit with the clerk of the convicting justice such a sum of money as such justice shall deem to be sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction and the costs of the appeal; and upon such notice being given, and such recognizance being entered

into, or such deposit being made, the justice before whom such recognizance shall be entered into, or such deposit shall be made, shall liberate such person if in custody ; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal or the affirmation of the conviction shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment ; and in any case where after any such deposit shall have been made as aforesaid the conviction shall be affirmed, the court may order the sum thereby adjudged to be paid, together with the cost of the conviction and the costs of the appeal, to be paid out of the money deposited, and the residue thereof, if any, to be repaid to the party convicted ; and in any case where after any such deposit the conviction shall be quashed, the court shall order the money deposited to be repaid to the party convicted ; and in every case where any conviction shall be quashed on appeal as aforesaid the clerk of the peace, or other proper officer, shall forthwith endorse on the conviction a memorandum that the same has been so quashed ; and whenever any copy or certificate of such conviction shall be made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence that the conviction has been quashed in every case where such copy or certificate would be sufficient evidence of such conviction.

111. No such conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record ; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

No certiorari,  
&c.

112. Every justice of the peace before whom any person shall be convicted of any offence against this Act shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court ; and upon any information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown.

Convictions to  
be returned to  
the quarter  
sessions.

113. All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise ; and notice in writing of such action and of the course thereof shall be given to the defendant one month at least before the commencement of the action ; and in any such action the defendant may plead the general issue, and give this Act and the special matter in evidence, at any trial to be had thereupon ; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant ; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant has by law in other cases ; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant unless

Venue, in  
proceedings  
against per-  
sons acting  
under this  
Act.

Notice of  
action.

General  
issue, &c.

the judge before whom the trial shall be shall certify his approbation of the action.

As to other matters :

Stealers of property in one part of the United Kingdom who have the same in any other part of the United Kingdom, may be tried and punished in that part of the United Kingdom where they have property.

114. If any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part ; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part.

Offences committed within the jurisdiction of the Admiralty.

115. All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in which the offender shall be apprehended or be in custody, and in any indictment for any such offence or for being an accessory to any such offence the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed 'on the high seas : ' provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

116. See Vol. 1, p. 67.

Fine and sureties for keeping the peace ; in what cases.

117. Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour ; and in case of any felony punishable under this Act the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized : provided, that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Hard labour.

118. Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Solitary confinement and whipping.

119. Whenever solitary confinement may be awarded for any indictable offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year ; and whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

Summary pro-

120. Every offence punishable on summary conviction may

be prosecuted in England in the manner directed by the Act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, so far as no provision is hereby made for any matter or thing which may be required to be done in the course of such prosecution, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the Act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any Act that may be passed for like purposes; and all provisions contained in the said Acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this Act: provided, that nothing in this Act contained shall in any manner alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the City of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

ceedings in England may be under the 11 & 12 Vict. c. 43, and in Ireland under the 14 & 15 Vict. c. 93;

except in London and metropolitan police district.

121. The court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

The costs of the prosecution of misdemeanors against this Act may be allowed.

122. Nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.

Act not to extend to Scotland.

123. This Act shall commence and take effect on the first day of November, 1861.

Commencement of Act.

## 24 & 25 VICT. c. 97.

### *An Act to consolidate and amend the Statute Law of England and Ireland relating to Malicious Injuries to Property.*

[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to malicious injuries to property:’ be it enacted by, &c. as follows:—

Sects. 1 to 10 inclusive will be found in vol. 2. See Index to Table of Statutes at the commencement of that volume.

Sects. 11 & 12. See vol. 1, p. 368.

Sects. 13 to 34 inclusive. See vol. 2.

Sects. 35 to 38 inclusive. See vol. 1, pp. 990, 991, 992.

Sects. 39 to 49 inclusive. See vol. 2.

Sect. 50. See vol. 3, p. 233.

Sects. 51 to 53 inclusive. See vol. 2, pp. 967, 968.

### *Making Gunpowder to commit Offences and searching for the same.*

54. Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Making or having gunpowder, &c. with intent to commit any felony against this Act.

Justices may issue warrants for searching houses, &c. for such gunpowder, &c.

55. Any justice of the peace of any county or place in which any machine, engine, implement, or thing, or any gunpowder or other explosive, dangerous, or noxious substance, is suspected to be made, kept, or carried for the purpose of being used in committing any of the felonies in this Act mentioned, upon reasonable cause assigned upon oath by any person, may issue a warrant under his hand and seal for searching in the daytime any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other place, or any carriage, waggon, cart, ship, boat, or vessel, in which the same is suspected to be made, kept, or carried for such purpose as hereinbefore mentioned; and every person acting in the execution of any such warrant shall have, for seizing, removing to proper places, and detaining every such machine, engine, implement, and thing, and all such gunpowder, explosive, dangerous, or noxious substances found upon such search, which he shall have good cause to suspect to be intended to be used in committing any such offence, and the barrels, packages, cases, and other receptacles in which the same shall be, the same powers and protections which are given to persons searching for unlawful quantities of gunpowder under the warrant of a justice by the Act passed in the session holden in the twenty-third and twenty-fourth years of the reign of Her present Majesty, chapter one hundred and thirty-nine, intituled, 'An Act to amend the law concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks.'

#### Other Matters.

Principals in the second degree and accessories.

Abettors in misdemeanors.

56. In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender.

A person loitering at night, and suspected of any felony against this Act, may be apprehended.

Malice against owner of property unnecessary.

57. Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony against this Act, and shall take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law.

58. Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.

Provisions of this Act shall apply to persons in possession of the property injured.

Intent to injure or defraud

59. Every provision of this Act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the Acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such Act shall be done.

60. It shall be sufficient in any indictment for any offence against this Act, where it is intended to allege an intent to injure or defraud, to allege that the party accused did the act with intent to



injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be).

61. Any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

62. Where any person shall be charged on the oath of a credible witness before any justice of the peace with any offence punishable on summary conviction under this Act, the justice may summon the person charged to appear at a time and place to be named in such summons; and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person by delivering the same to him personally, or by leaving the same at his usual place of abode), the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant; and the justice before whom the person charged shall appear or be brought shall proceed to hear and determine the case.

63. Whosoever shall aid, abet, counsel, or procure the commission of any offence which is by this Act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction before a justice of the peace, be liable, for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is by this Act made liable.

64. Every sum of money which shall be forfeited for the amount of any injury done shall be assessed in each case by the convicting justice, and shall be paid to the party aggrieved, except where he is unknown, and in that case such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such amount or otherwise, shall be paid and applied in the same manner as other penalties recoverable before justices of the peace are to be paid and applied in cases where the statute imposing the same contains no directions for the payment thereof to any person: provided, that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the amount of the injury done, in every such case no further sum shall be paid to the party aggrieved than such value or amount; and the remaining sum or sums forfeited shall be applied in the same manner as any penalty imposed by a justice of the peace is hereinbefore directed to be applied.

65. In every case of a summary conviction under this Act, where the sum which shall be forfeited for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, the convicting justice (unless where otherwise specially directed) may commit the offender to the common gaol or house of correction, there to be imprisoned only, or

particular persons need not be stated in any indictment.

Persons in the act of committing any offence may be apprehended without a warrant.

Mode of compelling the appearance of persons punishable on summary conviction.

Abettors in offences punishable on summary conviction.

Application of forfeitures and penalties upon summary convictions.

Proviso where several persons join in commission of same offence.

If a person summarily convicted shall not pay, &c., the justice may commit him.

to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two months, where the amount of the sum forfeited, or of the penalty imposed, or of both (as the case may be), together with the costs, shall not exceed five pounds ; and for any term not exceeding four months where the amount, with costs, shall not exceed ten pounds ; and for any term not exceeding six months in any other case ; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

The justice may discharge the offender in certain cases.

66. Where any person shall be summarily convicted before a justice of the peace of any offence against this Act, and it shall be a first conviction, the justice may, if he shall so think fit, discharge the offender from his conviction upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.

A summary conviction shall be a bar to any other proceeding for the same cause.

67. When any person convicted of any offence punishable upon summary conviction by virtue of this Act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the Crown, or the lord lieutenant or other chief governor of Ireland, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment awarded in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, he shall be released from all further or other proceedings for the same cause.

Appeal.

68. In all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction, for the county or place wherein the cause of complaint shall have arisen : provided, that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or shall enter into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded ; or if such appeal shall be against any conviction whereby only a penalty or sum of money shall be adjudged to be paid, shall deposit with the clerk of the convicting justice such a sum of money as such justice shall deem to be sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction and the costs of the appeal ; and upon such notice being given, and such recognizance being entered into, or such deposit being made, the justice before whom such recognizance shall be entered into, or such deposit shall be made, shall liberate such person if in custody ; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet ; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall if necessary issue process for enforcing such judgment ; and in any case where after any such deposit shall have been made as aforesaid the conviction shall be affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction and the costs of the appeal, to be paid out of the money deposited, and the residue thereof, if any, to be repaid to the party convicted, and in any case where after any such

deposit the conviction shall be quashed, the court shall order the money deposited to be repaid to the party convicted; and in every case where any conviction shall be quashed on appeal as aforesaid, the clerk of the peace or other proper officer shall forthwith indorse on the conviction a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction shall be made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence that the conviction has been quashed in every case where such copy or certificate would be sufficient evidence of such conviction.

69. No such conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

No certiorari,  
&c.

70. Every justice of the peace before whom any person shall be convicted of any offence against this Act shall transmit the conviction to the next Court of General or Quarter Sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown.

Convictions to  
be returned to  
the Quarter  
Sessions.

How far evi-  
dence in  
future cases.

71. All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant has by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action.

Venue in  
proceedings  
against per-  
sons acting  
under this  
Act.

Notice of  
action.

General issue,  
&c.

72. All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred

Offences com-  
mitted within  
the jurisdic-  
tion of the  
Admiralty.

to have been committed 'on the high seas : ' provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

Fine and  
sureties for  
keeping the  
peace ; in  
what cases.

73. Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to, or in lieu of any of the punishments by this Act authorized, find the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour ; and in case of any felony punishable under this Act, the Court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized : provided, that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Hard labour.

74. Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Solitary confinement and  
whipping.

75. Whenever solitary confinement may be awarded for any indictable offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year ; and whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped ; and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the court in the sentence.

Summary  
proceedings in  
England may  
be under the  
11 & 12 Vict.  
c. 43, and in  
Ireland under  
the 14 & 15  
Vict. c. 93 ;

76. Every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the Act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, so far as no provision is hereby made for any matter or thing which may be required to be done in the course of such prosecution, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the Act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any Act that may be passed for like purposes, and all provisions contained in the said Acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this Act : provided, that nothing in this Act contained shall in any manner alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the City of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

except in Lon-  
don and the  
metropolitan  
police district.

The costs of  
the prosecution  
of mis-  
demeanors  
against this  
Act may be  
allowed.

77. The court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony ; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Act not to  
extend to  
Scotland.

78. Nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.

Commence-  
ment of Act.

79. This Act shall commence and take effect on the first day of November, 1861.

24 &amp; 25 VICT. c. 98.

*An Act to consolidate and amend the Statute Law of England and Ireland relating to Indictable Offences for Forgery.*

[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to indictable offences by forgery :’ be it enacted, &c., as follows :

Sects. 1 to 48 inclusive will be found in vol. 2. See table of statutes at the commencement of that vol.

49. In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable ; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement ; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender.

Principals in the second degree and accessories. Abettors in misdemeanors.

50. All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place ; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed on ‘the high seas :’ provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty’s land or naval forces.

Offences committed within the jurisdiction of the Admiralty.

51. Whenever any person shall be convicted of a misdemeanor under this Act it shall be lawful for the court, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, to fine the offender, and to require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour ; and in all cases of felonies in this Act mentioned it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments by this Act authorized : provided, that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Fine and sureties for keeping the peace ; in what cases.

52. Whenever imprisonment, with or without hard labour, may be awarded for any offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Hard labour.

53. Whenever solitary confinement may be awarded for any offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.

Solitary confinement.

54. The court before which any indictable misdemeanor against this

The costs of

the prosecution of misdemeanor against this Act may be allowed.

Act not to extend to Scotland.

Commencement of Act.

Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

55. Nothing in this Act contained shall extend to Scotland, except a otherwise hereinbefore expressly provided.

56. This Act shall commence and take effect on the first day of November, 1861.

24 & 25 VICT. C. 99.

*An Act to consolidate and amend the Statute Law of the United Kingdom against Offences relating to the Coin.*

[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of the United Kingdom against offences relating to the coin:’ be it therefore enacted by, &c., as follows:—

Interpretation of terms.

Current gold and silver coin.

Copper coin.

False or counterfeit coin.

Current coin.

What shall be possession.

1. In the interpretation of and for the purposes of this Act, the expression ‘the Queen’s current gold or silver coin’ shall include any gold or silver coin coined in any of Her Majesty’s mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty’s dominions, whether within the United Kingdom or otherwise; and the expression ‘the Queen’s copper coin’ shall include any copper coin and any coin of bronze or mixed metal coined in any of Her Majesty’s mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty’s said dominions; and the expression ‘false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen’s current gold or silver coin’ shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the Queen’s current coin of a higher denomination; and the expression ‘the Queen’s current coin’ shall include any coin coined in any of Her Majesty’s mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty’s said dominions, and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include, not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person.

SECTS. 2 to 30 inclusive (except s. 23) will be found in the first volume. See the Table of Statutes at the commencement of that volume.

Penalty on persons having more than five pieces of such counterfeit foreign coin in their possession.

23. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall have in his custody or possession any greater number of pieces than five pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, or any such copper or other coin as in the last preceding section mentioned, shall, on conviction thereof before any justice of the peace, forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall for every such offence forfeit and pay any sum of money not exceeding forty shillings nor less than ten shillings for every such piece of false and counterfeit coin which shall be found in the cus-

tody or possession of such person, one moiety to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall not be forthwith paid it shall be lawful for any such justice to commit the person who shall have been adjudged to pay the same to the common gaol or house of correction, there to be kept to hard labour for the space of three months, or until such penalty shall be paid.

31. It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence, against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law.

Any person may apprehend any person committing any indictable offence against this Act.

32. No conviction for any offence punishable on summary conviction under this Act shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a valid conviction to sustain the same.

No certiorari, &c.

33. All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall, in England or Ireland, be laid and tried in the county where the fact was committed, and shall, in England, Ireland, or Scotland, be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant or defender one month at least before the commencement of the action; and in any such action brought in England or Ireland the defendant may plead the general issue, and give this Act and the special matter in evidence, at any trial to be had thereupon, and in Scotland the defender may insist on all relevant defences; and no plaintiff or pursuer shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant or defender; and if, in England or Ireland, a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, or if, in Scotland, the verdict shall be for the defender, or if the pursuer shall abandon the action, or the court shall dismiss it as irrelevant or improperly laid, in every such case the defendant or defender shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant or defender has by law in other cases; and though a verdict shall be given for the plaintiff or pursuer in any such action, such plaintiff or pursuer shall not have costs against the defendant or defender, unless the judge before whom the trial shall be shall certify his approbation of the action.

Venue in proceedings against persons acting under this Act.

Notice of action.

General issue.

Tender of amends, &c.

Secs. 34 to 40, inclusive, will be found in vol. 1. See Table of Statutes at commencement of that vol.

41. Every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the Act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the Act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any Act that may be passed for like purposes; and all provisions contained in the said Acts shall be

Summary proceedings in England may be under the 11 & 12 Vict. c. 43, and in Ireland under the 14 & 15 Vict. c. 93.

Except in  
London and  
the metropo-  
litan police  
district.

Costs of pro-  
secutions.

Commence-  
ment of Act.

applicable to such prosecutions in the same manner as if they were incorporated in this Act: provided, that nothing in this Act contained shall in any manner alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the City of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

42. In all prosecutions for any offence against this Act in England, which shall be conducted under the direction of the solicitors of Her Majesty's treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England which shall not be so conducted it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

43. This Act shall commence and take effect on the first day of November, 1861.

24 & 25 VICT. c. 100.

*An Act to consolidate and amend the Statute Law of England and Ireland relating to Offences against the Person.*

[6th August, 1861.]

'Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to offences against the person:' be it enacted by &c., as follows:

Secs. 1 to 56, inclusive, will be found in vol. 1. See the Table of Statutes at the commencement of that volume.

Sec. 57. See vol. 3, p. 264.

Secs. 58 to 65, inclusive, will be found in vol. 1. See Table of Statutes at the commencement of that volume.

#### *Other Matters.*

A person  
loitering at  
night, and  
suspected of  
any felony  
against this  
Act, may be  
apprehended.

Punishment of  
principals in  
the second  
degree, and  
accessories.

Offences com-  
mitted within  
the jurisdic-

66. Any constable or peace officer may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony in this Act mentioned, and shall take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law.

67. In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender.

68. All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same



punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed 'on the high seas': provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

tion of the  
Admiralty.

69. Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction.

Hard labour  
in gaol or  
house of  
correction.

70. Whenever solitary confinement may be awarded for any offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of any imprisonment, or of any imprisonment with hard labour, which the court may award, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any offence under this Act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

Solitary confinement and  
whipping.

71. Whenever any person shall be convicted of any indictable 'misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any punishment, by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act otherwise than with death the court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: provided, that no person shall be imprisoned for not finding sureties under this clause for any period exceeding one year.

Fine and  
sureties for  
keeping the  
peace; in  
what cases.

72. No summary conviction under this Act shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

No certiorari,  
&c.

73. Where any complaint shall be made of any offence against section twenty-six of this Act, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place, in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far

Guardians and  
overseers may  
be required to  
prosecute in  
certain cases  
of offences  
against this  
Act.

Costs of prosecution.

Clerk of guardians may be bound over to prosecute.

On a conviction for assault the court may order payment of the prosecutor's costs by the defendant.

Such costs may be levied by distress.

Summary proceedings in England may be under the 11 & 12 Vict. c. 43, and in Ireland under the 14 & 15 Vict. c. 93.

Except in London and the metropolitan police district.

The costs of the prosecution of misdemeanors against this Act may be allowed.

Act not to extend to Scotland.

Commencement of Act.

as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and, where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor, may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute.

74. Where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence.

75. The court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale, shall be paid to the owner; and in case such sum shall be so levied the imprisonment awarded until payment of such sum shall thereupon cease.

76. Every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the Act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the Act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any Act that may be passed for like purposes; and all provisions contained in the said Acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this Act: provided, that nothing in this Act contained shall in any manner alter or affect any enactment now in force relating to procedure, in the case of any offence punishable on summary conviction, within the City of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

77. The court before which any misdemeanor indictable under the provisions of this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

78. Nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.

79. This Act shall commence and take effect on the first day of November, 1861.

27 & 28 VICT. C. 47.

*An Act to amend the Penal Servitude Acts.*

[25th July, 1864.]

16 & 17 Vict. c. 99.

‘Whereas two Acts were passed, the one chapter ninety-nine in the session of the sixteenth and seventeenth years of the reign of Her present

Majesty, and the other chapter three in the session of the twentieth and twenty-first years of the same reign, having for their object the substitution of other punishments in lieu of transportation: And whereas it is expedient to amend the said Acts: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

20 & 21 Vict.  
c. 3.

1. This Act shall be construed as one with the above-mentioned Acts, and the said Acts, together with this Act, may be cited for all purposes as the Penal Servitude Acts, 1853, 1857, and 1864, and each of the said Acts may be cited as the Penal Servitude Act of the year in which it was passed.

Short titles.

### *Sentences of Penal Servitude.*

2. No person shall be sentenced to penal servitude in respect to any offence committed after the passing of this Act for a period of less than five years, and where under any Act now in force a period of less than five years is the utmost sentence of penal servitude that can be awarded, a period of five years shall, in respect to any offence committed after the passing of this Act, in such Act be substituted for the less period; and where under any Act now in force a period of either less or more than five years may be awarded as a sentence of penal servitude, the least sentence of penal servitude that can be awarded under that Act shall, in respect to any offence committed after the passing of this Act, be a period of five years; and where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, or, in Scotland, of any crime (whether such previous conviction shall have taken place upon an indictment or under the provisions of the Act passed in the eighteenth and nineteenth of Victoria, chapter one hundred and twenty-six), the least sentence of penal servitude that can be awarded in such case shall be a period of seven years.

Length of sentences,  
penal servi-  
tude.

### *Convict Prisons.*

3. One of Her Majesty's principal secretaries of state in Great Britain, and the lord lieutenant or other chief governor in Ireland, may, by warrant under his hand and seal, empower any two or more justices of the peace, to be named in such warrant, acting for any county in which a prison for the reception of convicts under sentence of penal servitude is situate, to order, from time to time, the infliction of corporal punishment on any convict confined in such prison, for an offence committed by such convict in such prison, and against the discipline thereof; and any two or more justices of the peace thus empowered shall have the same power of adjudicating on such offences, and of ordering the infliction of such punishment, to be exercised under the same conditions as one of the directors of convict prisons would have, and no greater.

Punishment of  
offences in  
convict  
prisons.

### *Licences.*

4. A licence granted under the said Penal Servitude Acts, or any of them, may be in the form set forth in Schedule (A.) to this Act annexed, and may be written, printed, or lithographed. If any holder of a licence granted in the form set forth in the said Schedule (A.) is convicted, either by the verdict of a jury, or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction; or if any holder of a licence granted under the said Penal Servitude Acts, or any of them, who shall be at large in

Forfeiture  
licence.

the United Kingdom, shall, unless prevented by illness or other unavoidable cause, fail to report (a) himself personally, if in Great Britain to the chief police station of the borough or police division, and if in Ireland to the constabulary station of the locality, to which he may go within three days after his arrival therein, and being a male subsequently once in each month, at such time and place, in such manner, and to such person as the chief officer of the constabulary force to which such station belongs shall appoint, or shall change his residence from one police district to another without having previously notified the same to the police or constabulary station to which he last reported himself, he shall be deemed guilty of a misdemeanor, and may be summarily convicted thereof, and his licence shall be forthwith forfeited by virtue of such conviction, but he shall not be liable to any other punishment by virtue of such conviction.

Offences by  
holders of a  
licence.

5. If any holder of a licence granted in the form set forth in the said Schedule (A.)—

1. Fails to produce his licence when required to do so by any judge, justice of the peace, sheriff, sheriff substitute, police or other magistrate before whom he may be brought charged with any offence, or by any constable or officer of the police in whose custody he may be, and also fails to make any reasonable excuse why he does not produce the same ; or
2. Breaks any of the other conditions of his licence by an act that is not of itself punishable either upon indictment or upon summary conviction ;

he shall be deemed guilty of an offence punishable summarily by imprisonment for any period not exceeding three months, with or without hard labour.

Apprehension  
of holder of  
licence with-  
out warrant.

6. Any constable or police officer may, without warrant, take into custody any holder of such a licence whom he may reasonably suspect of having committed any offence, or having broken any of the conditions of his licence, and may detain him in custody until he can be taken before a justice of the peace or other competent magistrate, and dealt with according to law.

Summary  
punishment  
of offences.

7. In England and Ireland any offence under this Act punishable summarily may be prosecuted summarily before two or more justices ; as to England, in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of Her Majesty Queen Victoria, chapter forty-three, intituled ‘ An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders,’ or any Act amending the same ; and as to Ireland, in manner directed by the Act passed in the session holden in the fourteenth and fifteenth years of the reign of Her Majesty Queen Victoria, chapter ninety-three, intituled ‘ An Act to consolidate and amend the acts regulating the proceedings of petty sessions, and the duties of justices of the peace out of quarter sessions in Ireland, or any Act amending the same.’

In Scotland any offence under this Act punishable summarily may be prosecuted upon summary conviction at the instance of the procurator fiscal before any sheriff or sheriff substitute, or before any two justices of the county, or before the magistrates or any police magistrate of the burgh in which the offence is committed.

Where holder  
of licence is  
summarily  
convicted,  
convicting

8. Where any holder of a licence granted in the form set forth in the said Schedule (A.) is convicted of an offence punishable summarily under this or any other Act, the justices, sheriff, sheriff substitute, or other magistrate convicting the prisoner shall without delay forward by post a certi-

ficate in the form given in Schedule (B.) to this Act annexed, if in England or Scotland to one of Her Majesty's principal secretaries of state, if in Ireland to the lord lieutenant or other chief governor of Ireland, and thereupon the licence of the said holder may be revoked in manner provided by the said Penal Servitude Acts.

9. Where any licence granted in the form set forth in the said Schedule (A.) is forfeited by a conviction of any indictable offence, or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted, and shall, for the purpose of his undergoing such last-mentioned punishment, be removed from the prison of any county, borough, or place in which he may be confined, to any prison in which convicts under sentence of penal servitude may lawfully be confined, by warrant under the hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence.

10. Provided always, that it shall be lawful for Her Majesty, or for the lord lieutenant or other chief governor in Ireland, whenever they shall respectively think fit, to grant from time to time to convicts under sentence of penal servitude, licences in any other form different from that set forth in Schedule (A.), which they may respectively consider it expedient to adopt, and containing other and different conditions; and such last-mentioned licences shall be revocable at pleasure by the authority by which they are granted; but no holder of such last-mentioned licence shall be deemed guilty of an offence punishable upon summary conviction merely by reason of the breach of the conditions of the said last-mentioned licences, or any of them.

magistrate to forward certificate to secretary of state or lord lieutenant of Ireland.

Effect of forfeiture or revocation of licence.

Licences may be granted in form differing from that in Schedule (A.)

#### SCHEDULE (A.)

##### *Order of Licence to a Convict made under the Statute.*

Whitehall,  
day of 18 .

Her Majesty is graciously pleased to grant to  
who was convicted of at the  
for the on the  
and was then and there sentenced to be kept in penal servitude for the  
term of and is now confined in the

Her Royal licence to be at large from the day  
of his liberation under this order during the remaining portion of his said  
term of penal servitude, unless the said  
shall before the expiration of the said term be convicted of some indict-  
able offence within the United Kingdom, in which case such licence will  
be immediately forfeited by law, or unless it shall please Her Majesty  
sooner to revoke or alter such licence.

This licence is given subject to the conditions endorsed upon the same,  
upon the breach of any of which it will be liable to be revoked, whether  
such breach is followed by a conviction or not.

And Her Majesty hereby orders that the said  
be set at liberty within thirty days from the date of this order.

Given under my hand and seal

*Conditions.*

1. The holder shall preserve his licence and produce it when called upon to do so by a magistrate or police officer.

2. He shall abstain from any violation of the law.

3. He shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes.

4. He shall not lead an idle and dissolute life, without visible means of obtaining an honest livelihood.

If his licence is forfeited or revoked in consequence of a conviction for any offence, he will be liable to undergo a term of penal servitude equal to the portion of his term of \_\_\_\_\_ years which remained unexpired when his licence was granted, viz. the term of \_\_\_\_\_ years.

## SCHEDULE (B.)

*Form of Certificate of Conviction of Holder of Licence.*

I do hereby certify that A. B., the holder of a licence under the Penal Servitude Acts, was on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ duly convicted by \_\_\_\_\_ of the offence of \_\_\_\_\_ and sentenced to \_\_\_\_\_

C. D.,  
Clerk to the said Justices.

28 VICT. c. 18.

*An Act for amending the Law of Evidence and Practice on Criminal Trials.*

[9th May, 1865.]

‘Whereas it is expedient that the law of evidence and practice on trials for felony and misdemeanor and other proceedings in courts of criminal judicature should be more nearly assimilated to that on trials at Nisi Prius :’ be it enacted by, &c., as follows ; that is to say,

1. That the provisions of section two of this Act shall apply to every trial for felony or misdemeanor which shall be commenced on or after the first day of July, one thousand eight hundred and sixty-five, and that the provisions of sections from three to eight, inclusive, of this Act shall apply to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence.

2. If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants ; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively ; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think

Provisions of  
sec. 2 of this  
Act to apply  
to trials com-  
menced on  
or after  
July 1, 1865.

Summing up  
of evidence  
in cases of  
felony and  
misdemeanor.

fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present.

3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

How far witness may be discredited by the party producing.

4. If a witness, upon cross examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

As to proof of contradictory statements of adverse witness.

5. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

Cross-examination as to previous statements in writing.

6. A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings, and no more, shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

Proof of previous conviction of witness may be given.

7. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto.

As to proof by attesting witnesses.

8. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

As to comparison of disputed writing.

9. The word 'counsel' in this Act shall be construed to apply to attorneys in all cases where attorneys are allowed by law or by the practice of any court to appear as advocates.

'Counsel.'

10. This Act shall not apply to Scotland.

Not to apply to Scotland.

28 &amp; 29 VICT. c. 124.

*An Act for consolidating certain Enactments relating to the Admiralty.*

[6th July, 1865.]

BE it enacted by, &amp;c., as follows :—

Provisions of  
27 & 28 Vict.  
c. 57, to apply  
to this Act.

1. The provisions of The Admiralty Lands and Works Act, 1864, respecting the user of lands, and respecting powers of management and leasing, and other rights and powers relative to lands, and respecting recovery of possession and sale of lands, and respecting actions and suits by and against the admiralty relative to lands, shall apply in relation to all lands for the time being vested in or purchased by the commissioners of the admiralty.

Style of Com-  
missioners of  
Admiralty in  
Suits.

2. Except as otherwise expressly provided, the commissioners of the admiralty for the time being may be styled, in any action, suit, or other proceeding at law or in equity, 'The Commissioners for executing the Office of Lord High Admiral of the United Kingdom,' without more; and any action, suit, or proceeding shall not be affected by any change among the commissioners of the admiralty; and in any action, suit, or proceeding the commissioners of the admiralty shall be liable and entitled to pay or receive costs according to the ordinary law and practice relative to costs.

As to Costs.

Prerogatives of  
the Crown in  
Suits pre-  
served, &c.

3. Nothing in this Act, or in the Admiralty Lands and Works Act, 1864, shall take away or abridge in any action or suit the legal rights, privileges and prerogatives of Her Majesty, her heirs and successors, but in all actions and suits instituted by or against the commissioners of the admiralty, and in all proceedings and matters connected therewith, the commissioners of the admiralty may exercise and enjoy all such rights, privileges, and prerogatives as are for the time being exercised and enjoyed in any action or suit in any court of law or equity by Her Majesty, her heirs or successors, as if the Crown were actually a party to such action or suit.

Saving for  
proceeding  
by informa-  
tion, &c.

4. Notwithstanding anything in this Act, or in The Admiralty Lands and Works Act, 1864, it shall be lawful for Her Majesty, her heirs and successors, to proceed by information in the Court of Exchequer, or by any other Crown process, legal or equitable, in any case in which it would have been competent for Her Majesty, her heirs or successors, so to proceed if no provisions respecting procedure had been inserted in this Act, or in the Admiralty Lands and Works Act, 1864.

Superinten-  
dents of dock-  
yards to be  
justices for  
certain pur-  
poses.

5. The superintendents of Her Majesty's dockyards shall be in all places justices of the peace in respect of all offences specified in this Act, and of all matters relating to Her Majesty's naval service, and the stores, provisions, and accounts thereof.

Punishment  
for uttering  
false petitions,  
certificate, &c.

6. If any person, in order to sustain any claim to any pay, wages, allotment, prize-money, bounty-money, grant, or other allowance in the nature thereof, half pay, pension or allowance from the Compassionate Fund of the navy, or other money payable by the admiralty, or to any effects or money in charge of the admiralty,—or in order to procure any person to be admitted a pensioner as the widow of an officer of the navy,—does any of the following things, namely,—offers or utters to any person in the service of the Crown or of the admiralty any false affidavit, knowing the same to be false, or makes or subscribes or offers or utters as aforesaid any false written petition, application, statement, answer, certificate, or voucher, or other false writing, knowing the same to be false,—every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept



in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.

7. The following sections of the Act of the session of the twenty-fourth and twenty-fifth years of Her Majesty's reign (chapter ninety-eight), 'to consolidate and amend the statute law of *England and Ireland* relating to indictable offences by forgery,' shall be incorporated with this Act, and shall be read as if they were here re-enacted, namely,—sections forty to forty-two and fifty to fifty-three (all inclusive); and for this purpose the expression 'this Act' used in the said incorporated sections shall be construed to include the present Act, and expressions therein used relating to forgery or forged writings shall be construed to apply to any Act being a misdemeanor under the last foregoing provision of this Act, and to writings made, subscribed, offered, or uttered in contravention of that Provision.

Parts of 24 & 25 Vict. c. 98 incorporated.

8. If any person in order to receive any pay, wages, allotment, prize-money, bounty-money, grant, or other allowance in the nature thereof, half pay, pension, or allowance from the Compassionate Fund of the navy, payable or supposed to be payable by the admiralty, or any other money so payable or supposed to be payable, or any effects or money in charge or supposed to be in charge of the admiralty, falsely and deceitfully personates any person entitled or supposed to be entitled to receive the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.

Punishment for personation of seamen, &c.

9. Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act or at common Law in respect of an offence (if any) punishable as well under this Act as under any other Act or at common law.

Saving for punishment under other Acts, &c.

10. This Act shall commence on such day, not later than the first day of *January*, 1866, as her Majesty in Council thinks fit to direct.

Commencement of Act.

11. Every Order in Council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and if not then within thirty days after the next meeting of Parliament.

As to publication of Orders in Council.

12. This Act may be cited as The Admiralty Powers, &c. Act, 1865.

Short title.

### 32 & 33 VICT. c. 89.

*An Act to amend the Law relating to the Office of Clerk of Assize and Offices united thereto, and to certain Fees upon Orders for Payment of Witnesses in Criminal Proceedings.*

[9th August, 1869.]

WHEREAS it is expedient to amend the law relating to the office of clerk of assize and offices united thereto, and to remove doubts which have arisen respecting the taking of certain fees, in pursuance of section 5 of 30 & 31 Vict. c. 35, 'to remove some defects in the administration of the criminal law.'

The Clerks of Assize, &c., Act, 1869.

Be it therefore enacted by, &c., as follows.

*Preliminary.*

1. This Act may be cited as The Clerks of Assize, &c. Act, 1869.
2. This Act shall not extend to Scotland or Ireland.

## PART I.

*Office of Clerk of Assize.*

Sec. 3 states the qualification for a clerk of assize.

Sec. 4 relates to his salary.

5. A clerk of assize who is paid by salary shall not take any fee for his own use; and if he is authorized by any Act passed or hereafter to be passed to take any fee for any duty performed by him, he shall take (by stamps or otherwise) and account for and pay over such fee in such manner as may be directed by the Commissioners of her Majesty's Treasury.

Sec. 6. Person hereafter appointed not to be entitled to compensation if office abolished, &c.

Sec. 7 relates to the removal of any person employed by any clerk of assize.

8. In this Act the term 'clerk of assize' includes clerk of the Crown and associate on circuit, and any other office the duties of which are at the passing of this Act or may hereafter be performed by the clerk of assize.

## PART II.

*Fees on Orders under 30 & 31 Vict. c. 35, s. 5.*

9. This part of this Act shall be construed as one with the recited Act of the 30 & 31 Vict. c. 35, which may be cited as The Criminal Law Amendment Act, 1867.

10. Where the officer of the court who, in pursuance of section five of The Criminal Law Amendment Act, 1867, makes out an order for the payment of expenses and compensation to witnesses, is paid by salary, or is for the time being allowed under the table of fees relating to his office to take one fee only of fixed amount in respect of his several duties relating to the prosecution of an offender, such officer shall make out and deliver such order without taking any fee for the same, and the said section shall be construed as if all mention of the sum or fee of sixpence were omitted therefrom.

11. Where the fee of sixpence is, in pursuance of section five of The Criminal Law Amendment Act, 1867, as amended by this Act, taken by a clerk of the peace or other officer, the amount of such fees received by him during any year after the passing of this Act shall be included in the total amount of fees in criminal prosecutions received by him, which is to be ascertained under section 18 of the 18 & 19 Vict. c. 126, 'for diminishing expense and delay in the administration of criminal justice in certain cases,' and shall be included in every return or account of fees made or rendered by such clerk of the peace or other officer.

34 & 35 Vict. c. 112.

*An Act for the more Effectual Prevention of Crime.*

[21st August 1871.]

The Prevention  
of Crimes Act,  
1871.

WHEREAS it is expedient to make further provision for the effectual prevention of crime :

Be it enacted, &c. as follows :—

*Preliminary.*

1. This Act may be cited as 'The Prevention of Crimes Act, 1871.' Short title.
2. This Act shall not come into operation until the second day of November one thousand eight hundred and seventy-one. Commence-  
ment of Act.

*Amendment of Penal Servitude Acts.*

3. Penalty on holders of licenses getting their living by dishonest means. See this section vol. 1, p. 75.
4. Penalty on breach of conditions of license. See this section vol. 1, p. 75.
5. Convict holding license to notify residence to police. See this section vol. 1, p. 75.

*Register of Criminals.*

6. The following enactments shall be made with a view to facilitate the identification of criminals : Register and  
photographing  
of crimi-  
nals (b).
  - (1.) Registers of all persons convicted of crime in the United Kingdom shall be kept in such form and containing such particulars as may from time to time be prescribed, in Great Britain by one of Her Majesty's Principal Secretaries of State, and in Ireland by the Lord Lieutenant :
  - (2.) The register for England shall be kept in London under the management of the commissioner of police of the metropolis, or such other person as the Secretary of State may appoint :
  - (3.) The register for Scotland shall be kept in Edinburgh under the management of the secretary to the managers of the General Prison at Perth, or such other person as the Secretary of State may appoint :
  - (4.) The register for Ireland shall be kept in Dublin under the management of the commissioners of police for the police district of Dublin metropolis, or such other person as the Lord Lieutenant may from time to time appoint :
  - (5.) In every prison, the gaoler or other governor of the prison shall make returns of the persons convicted of crime and coming within his custody ; and such returns shall be in such form or forms and contain such particulars in Great Britain as the Secretary of State, and in Ireland as the said Lord Lieutenant, may require ; and every gaoler or other governor of a prison who refuses or neglects to transmit such returns, or wilfully transmits a return containing any false or imperfect statement, shall for every such offence forfeit a sum not exceeding twenty pounds, to be recovered summarily :
  - (6.) In Great Britain the Secretary of State, and in Ireland the said Lord Lieutenant, may make regulations as to the photographing of all prisoners convicted of crime who may for the time being be confined in any prison in Great Britain or Ireland, and may in such regulations prescribe the time or times at which and the manner and dress in which such prisoners are to be taken, and the number of photographs of each prisoner to be printed, and the persons to whom such photographs are to be sent :

- (7.) Any regulations made by the Secretary of State as to the photographing of prisoners in any prison in England shall be deemed to be regulations for the government of that prison, and binding on all persons, in the same manner as if they were contained in the first schedule annexed to The Prison Act, 1865 :
- (8.) Any regulations made by the Secretary of State as to the photographing of prisoners in any prison in Scotland shall be deemed to be rules for prisons in Scotland, and as such shall be binding on all whom they may concern, in the same manner as if the same were made under and in virtue of the powers contained in 'The Prisons (Scotland) Administration Act, 1860 :'
- (9.) Any regulations made by the Lord Lieutenant as to the photographing of prisoners in any prison in Ireland shall be deemed to be byelaws duly made by the Lord Lieutenant, and shall be binding on all persons, in the same manner as if the same were made under the authority of the Act passed in the session holden in the nineteenth and twentieth years of the reign of Her present Majesty, chapter sixty-eight :
- (10.) Any prisoner refusing to obey any regulation made in pursuance of this section shall be deemed guilty of an offence against prison discipline, in England within the meaning of the fifty-seventh regulation in the first schedule annexed to the said Prison Act, 1865, in Scotland within the meaning of the rules for prisons in Scotland, certified under the hand of one of Her Majesty's Principal Secretaries of State, under and by virtue of 'The Prisons (Scotland) Administration Act, 1860,' and in Ireland within the meaning of the fifteenth regulation contained in section one hundred and nine of the Act passed in the seventh year of the reign of His late Majesty King George the Fourth, chapter seventy-four :
- (11.) Any authority having power to make regulations in pursuance of this section may from time to time modify, repeal, or add to any regulations so made :
- (12.) Any expenses incurred in pursuance of this section shall be defrayed as follows ; (that is to say,)

The expense of keeping the register in London, Edinburgh, and Dublin shall, to such amount as may be sanctioned by the treasury, be paid out of moneys provided by parliament. The expenses incurred in photographing the prisoners in any prison shall be deemed to be part of the expenses incurred in the maintenance of the prison, and shall be defrayed accordingly.

This section shall not apply to the prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prison.

#### *Punishment of Certain Offenders.*

7. Special offences by persons twice convicted of crime. See this sec. vol. 1, p. 76.

8. Person twice convicted may be subjected to police supervision. See this sec. vol. 1, p. 77.

9. The rules contained in the 116th section of the 24 & 25 Vict. c. 96, intituled, 'An Act to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar offences,' in

relation to the form of and the proceedings upon an indictment for any offence punishable under that Act committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a crime as defined by this Act after previous conviction for a crime, whether the crime charged in such indictment or the crime to which such previous conviction relates be or be not punishable under the said Act, 24 & 25 Vict. c. 96.

on indictment.

10. Every person who occupies or keeps any lodging-house, beer-house, public house, or other house or place where intoxicating liquors are sold, or any place of public entertainment or public resort, and knowingly lodges or knowingly harbours thieves or reputed thieves, or knowingly permits or knowingly suffers them to meet or assemble therein, or knowingly allows the deposit of goods therein having reasonable cause for believing them to be stolen, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding ten pounds, and in default of payment to be imprisoned for a period not exceeding four months, with or without hard labour, and the court before which he is brought may, if it think fit, in addition to or in lieu of any penalty, require him to enter into recognizances, with or without sureties, and if in Scotland to find caution, for keeping the peace or being of good behaviour during twelve months: Provided that

Penalty for harbouring thieves, &c.

(1.) No person shall be imprisoned for not finding sureties or cautioners in pursuance of this section for a longer period than three months; and

(2.) The security required from a surety or cautioner shall not exceed twenty pounds:

And any licence for the sale of any intoxicating liquors, or for keeping any place of public entertainment or public resort, which has been granted to the occupier or keeper of any such house or place as aforesaid, may, in the discretion of the court, be forfeited on his first conviction of an offence under this section, and on his second conviction for such an offence his licence shall be forfeited and he shall be disqualified for a period of two years from receiving any such licence; moreover, where two convictions under this section have taken place within a period of three years in respect of the same premises, whether the persons convicted were or were not the same, the court shall direct that for a term not exceeding one year from the date of the last of such convictions no such licence as aforesaid shall be granted to any person whatever in respect of such premises; and any licence granted in contravention of this section shall be void.

Any licensed person brought before a court in pursuance of this section shall produce his licence for examination, and if such licence is forfeited shall deliver it up altogether, and if such person wilfully neglects or refuses to produce his licence he shall, in addition to any other penalty under this section, be liable on summary conviction to a penalty not exceeding five pounds; provided that any person convicted under this section shall have a right to appeal against such conviction in the same manner in all respects as if the said conviction had been for an offence committed against the provisions of the Act of the ninth George the Fourth, chapter sixty-one.

11. Every person who occupies or keeps a brothel, and knowingly lodges or knowingly harbours thieves or reputed thieves, or knowingly permits or knowingly suffers them to meet or assemble therein, or knowingly allows the deposit of goods therein having reasonable cause for believing them to be stolen, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding ten pounds, and in default of payment to be imprisoned for a period not exceeding four months, with or without hard labour, and the court before which he is brought may, if

Penalty on brothel keepers harbouring thieves, &c.

Penalty on assaults on police.

it think fit, in addition to or in lieu of any penalty require him to enter into recognizances, with or without sureties, as in this Act described.

12. Where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act, and shall, in the discretion of the court, be liable either to pay a penalty not exceeding twenty pounds, and in default of payment to be imprisoned, with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months, with or without hard labour.

Penalty on dealers in old metals purchasing quantities less than stated in schedule.

13. Any dealer in old metals who either personally or by any servant or agent purchases, receives, or bargains for any metal mentioned in the first column of the schedule annexed hereto, whether new or old, in any quantity at any time of less weight than the quantity set opposite each such metal in the second column of the schedule annexed hereto, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding five pounds.

For the purposes of this section the term 'dealer in old metals' shall mean any person dealing in, buying, and selling old metal, scrap metal, broken metal, or partly manufactured metal goods, or defaced or old metal goods, and whether such person deals in such articles only, or together with second-hand goods or marine stores.

As to care of children of women convicted of crimes.

14. Where any woman is convicted of a crime, and a previous conviction of a crime is proved against her, any children of such woman under the age of fourteen years who may be under her care and control at the time of her conviction for the last of such crimes, and who have no visible means of subsistence, or are without proper guardianship, shall be deemed to be children to whom in Great Britain the provisions of The Industrial Schools Act, 1866, and in Ireland the provisions of The Industrial Schools (Ireland) Act, 1868, apply, and the court by whom such woman is convicted, or two justices or a magistrate, shall have the same power of ordering such children to be sent to a certified industrial school as is vested in two justices or a magistrate by the fourteenth section of The Industrial Schools Act, 1866, and by the eleventh section of The Industrial Schools (Ireland) Act, 1868, in respect of the children in the said sections described.

#### *Amendment of Criminal Law in certain Cases.*

Evidence of vagrancy and amendment of Vagrant Act.

15. Whereas by the fourth section of the Act passed in the fifth year of the reign of King George the Fourth, chapter eighty-three, intituled 'An Act for the punishment of idle and disorderly persons, and rogues and vagabonds, in that part of Great Britain called England,' it is, amongst other things, provided that every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond, and may be apprehended and committed to prison with hard labour for any time not exceeding three calendar months: And whereas doubts are entertained as to the construction of the said provision, and as to the nature of the evidence required to prove the intent to commit a felony: Be it enacted, firstly, the said section shall be construed as if instead of the words 'highway or place adjacent' there were inserted the words 'or any highway or any place adjacent to a street or highway;' and, secondly, that in proving the intent to commit a felony it shall not

be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony; and the provisions of the said section, as amended by this section, shall be in force in Scotland and Ireland. For the purposes of this section, in Scotland the word felony shall mean any of the pleas of the Crown, any theft, which in respect of aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing.

16. Any constable may under the circumstances hereafter in this section mentioned be authorised in writing by a chief officer of police to enter, and if so authorised may enter, any house, shop, warehouse, yard, or other premises in search of stolen property, and search and seize and secure any property he may believe to have been stolen, in the same manner as he would be authorised to do if he had a search warrant, and the property seized, if any, corresponded to the property described in such search warrant.

Power to search for stolen property.

In every case in which any property is seized in pursuance of this section the person on whose premises it was at the time of seizure, or the person from whom it was taken if other than the person on whose premises it was, shall, unless previously charged with receiving the same knowing it to have been stolen, be summoned before a court of summary jurisdiction to account for his possession of such property, and such court shall make such order respecting the disposal of such property, and may award such costs as the justice of the case may require.

It shall be lawful for any chief officer of police to give such authority as aforesaid in the following cases, or either of them:—

First. When the premises to be searched are, or within the preceding twelve months have been, in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves: or

Second. When the premises to be searched are in the occupation of any person who has been convicted of any offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment:

And it shall not be necessary for such chief officer of police on giving such authority to specify any particular property, but he may give such authority if he has reason to believe generally that such premises are being made a receptacle for stolen goods.

#### *Legal Proceedings.*

17. Any offence against this Act may be prosecuted before a court of summary jurisdiction, as follows:

As to legal proceedings to be taken before courts of summary jurisdiction.

In England, in manner directed by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-three, intituled “An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders,” and any Act amending the same:

In Scotland, under the provisions of “The Summary Procedure Act, 1864,” and any Act amending the same:

In Ireland, within the police district of Dublin metropolis, according to the provisions of the Act regulating the powers and duties of justices of the peace for such district, or of the police of such district, and elsewhere in Ireland in manner directed by “The Petty Sessions (Ireland) Act, 1851,” and any Act amending the same:

“Court of Summary Jurisdiction” shall in this Act mean and include any justice or justices of the peace, sheriff or sheriff substitute, metropolitan police magistrate, stipendiary or other magistrate, or officer, by whatever name called, to whom jurisdiction is given by the Acts in this section mentioned, or any Acts therein referred to, or to proceedings before whom the provisions of such Acts are or may be made applicable.

Provided as follows :—

(1.) The “Court of Summary Jurisdiction” when hearing and determining an information, complaint, or other proceeding in respect of an offence against this Act, shall be constituted in some one of the following manners ; that is to say, in England, either of two or more justices of the peace in petty sessions sitting at a place appointed for holding petty sessions, or of one of the magistrates hereinafter mentioned, sitting alone or with others at some court or other place appointed for the administration of justice ; that is to say, the Lord Mayor, a metropolitan police magistrate, a stipendiary magistrate, or some other officer or officers for the time being empowered by law to do alone or with others any act authorised to be done by more than one justice of the peace ; and in Scotland, of two or more justices of the peace sitting as judges in a justice of the peace court, or of one of the magistrates hereinafter mentioned, sitting alone or with others at some court or other place appointed for the administration of justice ; that is to say, the sheriff or sheriff substitute of the county, or the provost or other magistrate of a royal burgh, or some other officer or officers for the time being empowered by law to do alone or with others any act authorised to be done by more than one justice of the peace ; and all necessary powers and authorities are hereby conferred upon such court in Scotland ; in Ireland, within the police district of Dublin metropolis, of one of the divisional justices of the said district sitting at a police court within the said district ; and elsewhere, of a stipendiary magistrate sitting alone or with others, or of any two or more justices of the peace sitting in petty sessions at a place appointed for holding petty sessions.

(2.) The description of any offence against this Act in the words of this Act shall be sufficient in law.

(3.) Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived no proof in relation to the matters so specified or negatived shall be required on the part of the informant or prosecutor or complainant.

(4.) Where any offence against this Act involves the forfeiture of a licence granted under the Penal Servitude Acts, the court by whom the offender is convicted may commit him to any prison within its jurisdiction, there to remain until he can conveniently be removed to some prison in which convicts under sentence of penal servitude may lawfully be confined, in order that he may there undergo the term of penal servitude to which he is liable under the said Penal Servitude Acts or some of them ; and any person so committed may be kept to hard labour.

(5.) Any person accused of an offence against this Act may be remanded from time to time by the court before whom he is brought for the purpose of enabling evidence to be obtained against him, or for any other just cause.

(6.) No warrant or conviction in respect of any offence against this Act shall be quashed for want of form, and the court before whom any question relating to the validity of any such warrant or conviction is brought, may amend such warrant or conviction if it is of opinion that there was



sufficient evidence before the court by whom the warrant was issued or conviction made to justify the issue of such warrant or making of such conviction.

(7.) All penalties imposed under this Act in Scotland may, unless it is otherwise provided, in default of payment, be enforced by imprisonment for a term to be specified in the judgment or sentence of the court, but not exceeding three calendar months; and all penalties imposed and recovered under this Act in Scotland shall be paid to the clerk of the court, and by him accounted for and paid to the Queen's and Lord Treasurer's Remembrancer in behalf of Her Majesty.

All penalties imposed under this Act in Ireland shall be applied according to The Fines (Ireland) Act, 1851, or any Act amending the same.

18. A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.

Evidence of  
previous  
conviction.

A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof.

A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section.

The mode of proving a previous conviction authorised by this section shall be in addition to and not in exclusion of any other authorised mode of proving such conviction.

19. Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

Evidence in  
cases of re-  
ceiving stolen  
property.

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen. *Provided* that not less than

seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.

*Definitions.*

Interpretation.	20. The expression "The Penal Servitude Acts" means, as the case requires, the Penal Servitude Acts, 1853, 1857, and 1864, or any of them.
'Penal Servitude Acts.'	The expression "crime" means, in England and Ireland, any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under the 24 & 25 Vict. c. 96, s. 58; and in Scotland, any of the pleas of the Crown, any theft which, in respect of any aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing, falsehood, fraud, and wilful imposition, uttering base coin, or the possession of such coin with intent to utter the same.
'Offence.'	The expression "offence" means any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction.
'Indictment.'	The expression "indictment" shall in Scotland include criminal letters and criminal libel.
'Police district.'	The expression "police district" means— In England,— <ol style="list-style-type: none"> <li>(1.) The city of London and the liberties thereof:</li> <li>(2.) The metropolitan police district:</li> <li>(3.) Elsewhere in England, any county, riding, part, division, or liberty of a county, borough, burgh, city, town, place, or union, or combination of places maintaining a separate police force; and all the police under one chief constable shall be deemed to constitute one force for the purposes of this definition:</li> </ol> In Scotland,— Any county, city, burgh, town, place, or combination of places maintaining a separate police force; and all the police under one chief constable shall be deemed to constitute one force for the purposes of this definition: In Ireland,— <ol style="list-style-type: none"> <li>(1.) The police district of Dublin metropolis:</li> <li>(2.) Elsewhere in Ireland, any district, whether city, town, or country, over which is appointed a sub-inspector of the Royal Irish Constabulary.</li> </ol>
'Chief officer of police.'	The expression "chief officer of police" means— In England,— <ol style="list-style-type: none"> <li>(1.) In the city of London and the liberties thereof, the commissioner of city police:</li> <li>(2.) In the metropolitan police district, the commissioner of police of the metropolis:</li> <li>(3.) Elsewhere in England, the chief constable, or head constable, or other officer, by whatever name called, having the chief command of the police in the police district in reference to which such expression occurs:</li> </ol> In Scotland,— The chief constable, or head constable, or other officer, by whatever

name called, having the chief command of the police in the police district in reference to which such expression occurs :

In Ireland,—

(1.) In the police district of Dublin metropolis, either of the commissioners of police for the said district :

(2.) Elsewhere in Ireland, in any other police district, the sub-inspector of the Royal Irish Constabulary :

Any act or thing by this Act authorised to be done by the chief officer of police may be done by any person authorised by him in that behalf.

The expression "Lord Lieutenant" includes the Lords Justices or other chief governors or governor of Ireland for the time being. 'Lord Lieutenant.'

#### *Repeal of Acts, and Saving Clause.*

21. From and after the time at which this Act comes into operation, there shall be repealed, Repeal of Acts.

(1.) "The Habitual Criminals Act, 1869 :"

(2.) So much of the fourth section of "The Penal Servitude Act, 1864," as requires the holder of a license to report himself.

Provided that the repeal enacted in this Act shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation, or any prosecution or other remedy or legal proceeding for enforcing or recovering any such penalty, forfeiture, or other punishment as aforesaid.

22. This Act shall not affect the infliction of capital punishment in any case where capital punishment would have been inflicted if this Act had not passed. Saving as to capital punishment.

#### SCHEDULE above referred to.

COLUMN 1.	COLUMN 2.
List of Metals.	Quantities of not less than
Lead, or any composite the principal ingredient of which is lead . . . . .	112 lbs.
Copper, or any composite the principal ingredient of which is copper . . . . .	56 lbs.
Brass, or any composite the principal ingredient of which is brass . . . . .	56 lbs.
Tin, or any composite the principal ingredient of which is tin . . . . .	56 lbs.
Pewter, or any composite the principal ingredient of which is pewter. . . . .	56 lbs.
German silver or spelter, or any composite the principal ingredient of which is german silver or spelter . . . . .	56 lbs.

37 & 38 VICT. c. 88.

*An Act to amend the law relating to the registration of births and deaths in England, and to consolidate the law respecting the registration of births and deaths at sea.* [7th August, 1874.]

#### *Registration of Births and Deaths at Sea.*

37. The provisions of this Act, save as is herein expressly provided, shall not apply to the registration of births and deaths on board a vessel at sea, with respect to which the following provisions shall have effect.

(1.) The captain or master of, or other person having the command or charge of a British ship shall, as soon as may be after the occurrence of the birth of a child, or the death of a person on board such ship, record in his log book or otherwise the fact of such birth or

death, and the particulars required by the fourth schedule (a) to this Act to be registered concerning such birth or death, or such of them as may be known to him, and shall (unless the ship is one of Her Majesty's ships) upon the arrival of such ship at any port of the United Kingdom, or at such other time or place as the Board of Trade may from time to time with respect to any ship or class of ships direct, deliver, or send, in such form and manner as the Board of Trade may from time to time direct, a return of the facts so recorded to the Registrar-General of Shipping and Seamen.

- (2.) Where a ship which is not a British ship carries passengers to or from any port of the United Kingdom as the port of destination or the port of departure of such ship, the provisions of this section shall apply to the captain or master of, or other person having the command or charge of such ship, in like manner as if it were a British ship.
- (3.) Where the said return is directed by the Board of Trade (whether the ship is British or foreign) to be delivered upon the arrival of the ship, or the discharge of the crew, or otherwise at any port or place out of the United Kingdom, the Board of Trade may, if they think fit, direct that the return, instead of being delivered to the Registrar-General of Shipping and Seamen, shall be delivered, and the same shall accordingly be delivered, if such port or place is within Her Majesty's dominions, to the shipping master or collector of customs at such port or place, and if it is a foreign port or place, to the principal British consular officer at the said foreign port or place, and such shipping master, collector, or officer shall send the same, as soon as may be, by post or otherwise, to the Registrar-General of Shipping and Seamen.
- (4.) Where it appears from any such return that the father of any child so born, or if the child is a bastard the mother of such child, was a Scotch or Irish subject of Her Majesty, or that any person whose death is mentioned in such return was a Scotch or Irish subject of Her Majesty, the Registrar-General of Shipping and Seamen shall from time to time send a certified copy of so much of the return as relates to such birth or death to the Registrar-General of Births and Deaths in Scotland or Ireland, as the case may require.
- (5.) The Registrar-General of Shipping and Seamen shall from time to time send to the Registrar-General of Births and Deaths in England, a certified copy of every other such return, or of that part of every such return which is not so sent to the Registrar-General of Births and Deaths in Scotland and Ireland.

(a) FOURTH SCHEDULE.

Particulars to be Registered by Captain of a Ship concerning a Birth at Sea.	Particulars to be Registered by Captain of a Ship concerning a Death at Sea.
Date of birth.	Date of death.
Name (if any) and sex of the child.	Name and surname.
Name and surname, and rank, profession, or occupation of the father.	Sex.
Name and surname and maiden surname of mother.	Age.
Nationality and last place of abode of the father and mother.	Rank, profession, or occupation.
	Nationality and last place of abode. Cause of death.

- (6.) A captain of, or other person having charge of one of Her Majesty's ships, shall upon the arrival of any such ship in any port of the United Kingdom, or at such other time as the Commissioners of the Admiralty may from time to time direct, deliver, or send, in such manner and form as the said Commissioners may from time to time direct, a return of the facts recorded in pursuance of this section to that Registrar-General of Births and Deaths to whom a copy of such return would, if the ship were a merchant ship, be sent under the provisions of this section by the Registrar-General of Shipping and Seamen.
- (7.) Every Registrar-General of Births and Deaths to whom a copy of any return or a return is sent in pursuance of this section, shall cause the same to be filed and preserved in or copied in a book to be kept by him for the purpose, and to be called a marine register book, and such book shall be deemed to be a certified copy of a register book within the meaning of the Acts relating to the registration of births and deaths in England, Scotland, and Ireland respectively.
- (8.) Every captain, or master of, or other person having charge of a ship who fails to comply with this section shall be liable to a penalty not exceeding five pounds for each offence, and such penalty may be recovered in the same courts and places, and in the like manner, and when recovered shall be applied in like manner, as a penalty under the Merchant Shipping Act, 1854.
- (9.) This section shall extend to all places and persons within British jurisdiction.
- (10.) Terms in this section shall have the same meaning as in the Merchant Shipping Act, 1854.

39 & 40 VICT. c. 20.

*An Act to Facilitate the Revision of the Statute Law by substituting in certain Acts, incorporating enactments which have been otherwise repealed, a reference to recent enactments still in force.*

[27 June, 1876.]

3. There shall be repealed so much of sec. 7 of the Municipal Corporation Mortgages, &c. Act, 1860, as provides that a person guilty of a misdemeanor thereunder shall be subject in respect thereof to the provisions of the Act 20 & 21 Vict. c. 54, applicable to any person guilty of a misdemeanor under that Act (which Act has since been repealed), and in place thereof be it enacted as follows: that any person guilty of a misdemeanor under sec. 7 of the Municipal Corporation Mortgages, &c. Act, 1860, shall be subject in respect thereof to the provisions of the Larceny Act, 1861, (24 & 25 Vict. c. 96) applicable to any person guilty of a misdemeanor under sec. 75 of that Act.

4. There shall be repealed so much of the 23rd section of the 18 & 19 Vict. c. 126, as provides for the definition of "property" by reference to the 7 & 8 Geo. 4, c. 29, which Act has since been repealed, and in place thereof be it enacted that—

"Property" as used in the 18 & 19 Vict. c. 126 shall have the same meaning as "Property" has in the Larceny Act, 1861. (24 & 25 Vict. c. 96).

5. There shall be repealed so much of sec. 10 of the Prevention of Crimes Act, 1871, as provides that "any person convicted under that section shall have a right to appeal against such conviction in the same manner in all respects as if the said conviction had been for an offence committed against the provisions of the Act of the 9 Geo. 4, c. 61," which last mentioned provisions have since been repealed, and in place

thereof be it enacted that : Any person convicted under sec. 10 of the Prevention of Crimes Act, 1871, shall have a right to appeal against such conviction in the same manner in all respects as a person may appeal who feels aggrieved by a conviction made by a court of summary jurisdiction under the Licensing Act, 1872, and all the provisions of such last-mentioned Act, and of any Act amending the same, relating to an appeal from a conviction made by a court of summary jurisdiction under such last-mentioned Act, shall apply accordingly.

Effect of repeals.

6. The repeals enacted in this Act shall not affect :

- (1.) Anything duly done or suffered ; or
- (2.) Any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence against any enactment hereby repealed ; or
- (3.) The institution of any investigation or legal proceeding for enforcing or recovering any such penalty, forfeiture, or punishment as aforesaid, and such investigation or legal proceeding may be carried on as if this Act had not passed.

Short title of Act.

8. This Act may be cited as " The Statute Law Revision (substituted enactments) Act, 1876."

39 & 40 VICT. c. 23.

*An Act to Amend the Prevention of Crimes Act, 1871.*

[13 July, 1876.]

Whereas by the Prevention of Crimes Act, 1871, all persons convicted of crime in the United Kingdom are required to be registered and photographed, and unnecessary expense is thereby incurred :

Be it therefore enacted by, &c., as follows :—

Short title of Act.

1. This Act may be cited for all purposes as the Prevention of Crimes Amendment Act, 1876.

Restriction on obligation to register and photograph criminals.

2. In Great Britain the Secretary of State, and in Ireland the Lord Lieutenant, may from time to time by order prescribe the class or classes of prisoners to which the enactments of the Prevention of Crimes Act, 1871, relating to registry and photographing are for the time being to apply ; and such enactments shall, so long as any such orders are in force, be deemed to apply to the prescribed class or classes of prisoners only, and not to all persons convicted of crime.

39 & 40 VICT. c. 36.

*An Act to Consolidate the Customs Laws.*

[24 July, 1876.]

Whereas it is expedient that the several Acts now in force for the management and regulation of Customs should be consolidated into one Act, be it enacted, &c.

Penalty on making false declarations, signing false documents, and untruly answering questions, and counterfeiting and using false documents.

As to making and signing false declarations relating to the Customs, falsely answering questions, and counterfeiting documents :—

168. If any person shall in any matter relating to the Customs or under the control or management of the Commissioners of Customs, make or subscribe, or cause to be made or subscribed, any false declaration, or make or sign any declaration, certificate, or other instrument required to be verified by signature only, the same being false in any particular, or if any person shall make or sign any declaration made for the consideration of the Commissioners of Customs on any application presented to them, the same being untrue in any particular, or if any person required by this or any other Act relating to the Customs to answer questions put to him by the officers of Customs shall not truly answer such questions, or if any person shall counterfeit, falsify, or wilfully use when counterfeited or falsified, any document required by this or any

Act relating to the Customs, or by or under the directions of the Commissioners of Customs, or any instrument used in the transaction of any business or matter relating to the Customs, or shall alter any document or instrument after the same has been officially issued; or counterfeit the seal, signature, initials, or other mark of or used by any officer of the Customs for the verification of any such document or instrument, or for the security of goods, or any other purpose in the conduct of business relating to the Customs, or under the control or management of the Commissioners of Customs or their officers, every person so offending shall for every such offence forfeit the penalty of one hundred pounds.

181. If any ship or boat liable to seizure or examination under the Customs Act shall not bring to when required so to do, the master of such ship or boat shall forfeit the sum of twenty pounds: and on such ship or boat being chased by any vessel or boat in Her Majesty's navy having the proper pendant and ensign of Her Majesty's ship hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person having the charge or command of such vessel or boat in Her Majesty's navy, or employed as aforesaid (first causing a gun to be fired as a signal), to fire at or into such ship or boat, and such captain, master, or other person acting in his aid or by his direction shall be and is hereby indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing.

182. Any officer of Customs or other person duly employed for the prevention of smuggling may go on board any ship or boat which shall be within the limits of any port of the United Kingdom or the Channel Islands, and rummage and search the cabin and all other parts of such ship or boat for prohibited or uncustomed goods, and remain on board such ship or boat so long as she shall continue within the limits of such port.

184. Any officer of Customs or other persons duly employed for the prevention of smuggling may search any person on board any ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or any person who shall have landed from any ship or boat, provided such officer or other person duly employed as aforesaid shall have good reason to suppose that such person is carrying or has any uncustomed or prohibited goods about his person; and if any person shall rescue, destroy, or attempt to destroy any goods to prevent seizure, or obstruct any such officer or other person duly employed as aforesaid in going, remaining, or returning from on board, or in searching such ship or boat, or person, or otherwise in the execution of his duty, every such person shall forfeit a sum not exceeding one hundred pounds.

185. Before any person shall be searched he may require to be taken with all reasonable dispatch before a justice, or before the collector or other superior officer of Customs, who shall, if he see no reasonable cause for search, discharge such person; but if otherwise, direct that he be searched, and if a female she shall not be searched by any other than a female; but if any officer shall without reasonable ground cause any person to be searched, such officer shall forfeit and pay a sum not exceeding ten pounds. If any passenger or other person on board any such ship or boat, or who may have landed from any such ship or boat, shall, upon being questioned by any officer of Customs or other person duly employed for the prevention of smuggling whether he has any foreign goods upon his person or in his possession or in his baggage, deny the same, and any such goods shall after such denial be discovered to be or to have been upon his person or in his possession or in his baggage, such goods shall be forfeited, and such person shall forfeit one hundred pounds, or treble the value of such goods, at the election of the Commissioners of Customs.

Ships not bringing to when required to, penalty 20*l*. Not bringing to may be fired into.

Ships may be searched within the limits of the ports.

Persons may be searched if officers have reason to suspect smuggled goods are concealed upon them.

Persons before search may require to be taken before a justice, or officer of customs, &c.

Illegally importing, unshipping, removing from quay, &c., carrying goods into warehouse without authority, removing from warehouse, harbouring, carrying, evading duties of customs, penalty treble value, or 100l.

186. Every person who shall import or bring, or be concerned in importing or bringing into the United Kingdom, any prohibited goods or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unshipped or not; or shall unship, or assist or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured; or shall deliver, remove, or withdraw from any ship, quay, wharf, or other place previous to the examination thereof by the proper officer of Customs, unless under the care or authority of such officer, any goods imported into the United Kingdom, or any goods entered to be warehoused after the landing thereof, so that no sufficient account is taken thereof by the proper officer, or so that the same are not duly warehoused; or shall carry into the warehouse any goods entered to be warehoused or to be re-warehoused, except with the authority or under the care of the proper officer of Customs, and in such manner, by such person, within such time, and by such roads or ways as such officer shall direct; or shall assist or be otherwise concerned in the illegal removal or withdrawal of any goods from any warehouse or place of security in which they shall have been deposited; or shall knowingly harbour, keep, or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept, or concealed, any prohibited, restricted, or uncustomed goods, or any goods which shall have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited; or shall knowingly acquire possession of any such goods; or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods; or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs, or of the law and restrictions of the Customs relating to the importation, unshipping, landing, and delivery of goods, or otherwise contrary to the Customs Acts; shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons.

Rescuing goods, rescuing person, assaulting, resisting, or obstructing officers.

187. Every person who shall rescue, or endeavour to rescue, any goods seized by any officer of Customs or other person authorised to seize the same, or before or after the seizure shall stave, break, or destroy, or endeavour to stave, break, or destroy any goods, to prevent the seizure or the securing thereof by such officer or other person; or shall rescue any person apprehended for any offence punishable by fine or imprisonment under the Customs Acts, or prevent or attempt to prevent his apprehension; or shall assault or obstruct any officer of the army, navy, marines, coastguard, customs, or other person duly employed for the prevention of smuggling, in the execution of his duty, or in the seizing of any goods liable to forfeiture under the Customs Acts, or shall aid, abet, or assist in committing any of the foregoing offences, shall for each such offence forfeit a penalty of one hundred pounds.

Penalty for assembling to run goods.

188. All persons to the number of three or more who shall assemble for or having so assembled shall unship, land, run, carry, convey, or conceal any spirits, tobacco, or prohibited, restricted, or uncustomed goods, shall each forfeit a penalty not exceeding five hundred pounds nor less than one hundred pounds.

Procuring or hiring persons

189. Every person who shall by any means procure or hire, or shall depute or authorise any other person to procure or hire, any person or



persons to assemble for the purpose of being concerned in the landing or unshipping, or carrying, conveying, or concealing any goods which are prohibited to be imported, or the duties for which have not been paid or secured, shall be imprisoned for any term not exceeding twelve months, and if any person engaged in the commission of any of the above offences be armed with fire-arms or other offensive weapons, or whether so armed or not be disguised in any way, or be so armed or disguised, shall be found with any goods liable to forfeiture under the Customs Acts, within five miles of the seacoast or of any tidal river, shall be imprisoned with or without hard labour for any term not exceeding three years.

to assemble to run goods, persons armed, or disguised with goods within five miles of coast.

190. No person shall, after sunset or before sunrise, between the twenty-first day of September and the first day of April, or after the hour of eight in the evening, and before the hour of six in the morning, at any other time of the year, make, aid, or assist in making, any signal in or on board or from any ship or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving notice to any person on board any smuggling ship or boat, whether any person so on board of such ship or boat be or not within distance to notice any such signal; and if any person, contrary to the Customs Acts, shall make or cause to be made, or aid or assist in making any such signal, he shall be guilty of a misdemeanor, and may be stopped, arrested, detained, and conveyed before any justice, who, if he see cause, shall commit the offender to the next county gaol, there to remain until delivered by due course of law; and it shall not be necessary to prove on any indictment or information in such case that any ship or boat was actually on the coast; and the offender being duly convicted, shall, by order of the Court before whom he shall be convicted, either forfeit the penalty of one hundred pounds, or, at the discretion of such Court, be committed to a gaol or house of correction, there to be kept to hard labour for any term not exceeding one year.

Persons signalling smuggling vessels may be detained and forfeit 100*l.* or to be kept to hard labour for one year.

191. If any person be charged with having made or caused to be made, or for aiding or assisting in making, any such signal as aforesaid, the burden of proof that such signal so charged as having been made with intent and for the purpose of giving such notice as aforesaid was not made with such intent and for such purpose, shall be upon the defendant against whom such charge is made.

Proof of a signal not being intended, on defendant.

192. Any person whatsoever may prevent any signal being made as aforesaid, and may go upon any lands for that purpose, without being liable to any indictment, suit, or action for the same.

Any person may prevent signals.

193. If any person shall maliciously shoot at any vessel or boat belonging to Her Majesty's navy, or in the service of the revenue, or shall maliciously shoot at, maim, or wound any officer of the army, navy, marines, or coastguard, being duly employed in the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, upon conviction, be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to penal servitude for any term not less than five years, or to be imprisoned for any term not exceeding three years.

Persons shooting at boats belonging to navy or revenue service guilty of felony.

198. Where any person, being part of the crew of any ship in Her Majesty's employment or service, shall have been detained under the Customs Acts, such person, upon notice thereof to the commanding officer of the ship, shall be placed in security by such commanding officer on board such ship or vessel, until required to be brought before a justice to be dealt with according to law, for which purpose such commanding officer shall deliver him to the detaining officer.

Persons in Her Majesty's service detained, to be secured on board until warrant procured.

Any person escaping may afterwards be detained.

199. If any person liable to be detained under the Customs Acts shall not be detained at the time of committing the offence, or being detained, shall escape, he may afterwards be detained at any place in the United Kingdom within three years from the time such offence was committed, and if detained, may be taken before any justice to be dealt with as if he had been detained at the time of committing such offence, or if not so detained, may be proceeded against by information and summons.

Only officers to take up spirits in casks sunk or floating upon the sea, and persons giving information may be rewarded.

200. If any person, not being an officer of the navy, customs, or excise, shall intermeddle with or take up any spirits being in casks of less content than twenty gallons found floating upon or sunk in the sea, such spirits shall be forfeited, together with any vessel or boat in which they may be found; but if any person shall give information to any such officer so that seizure of such spirits may be made, he shall be entitled to such reward as the Commissioners of Customs may direct.

Penalty for offering goods for sale on pretence of being smuggled.

201. If any person shall offer for sale any goods under pretence that the same are prohibited, or have been unshipped and run ashore without payment of duties, all such goods (although not liable to any duties or prohibited) shall be forfeited, and every person so offering the same for sale shall forfeit treble the value of such goods.

Ships, &c., used in removal of raw goods to be forfeited, &c.

202. All ships, boats, carriages, or other conveyances, together with all horses and other animals and things made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts shall be forfeited, and all ships, boats, goods, carriages, or other conveyances, together with all horses and other animals and things liable to forfeiture, and all persons liable to be detained for any offence under the Customs Acts, or any other Act whereby officers of Customs are authorized to seize or detain persons, goods, or other things, shall or may be seized or detained in any place either upon land or water by any of the following persons, being duly employed for the prevention of smuggling, that is to say, any officer of Her Majesty's army, navy, marines, coastguard, customs, or excise, or by any person having authority from the Commissioners of Customs or Inland Revenue to seize, or by any constable or police officer of any county, city, or borough in the United Kingdom so employed with the sanction of the magistrates having jurisdiction therein, or under or by virtue of any Act in relation thereto, and all ships, boats, goods, carriages, or other conveyances, together with all horses and other animals and things so seized, shall forthwith be delivered into the care of the collector or other proper officer of customs at the nearest custom-house; and the forfeiture of any ship, boat, carriage, animal, or other things shall be deemed to include the tackle, apparel, and furniture thereof, and the forfeiture of any goods shall be deemed to include the package in which the same are found, and all the contents thereof.

Officers of customs may, on probable cause, stop carts, &c., and search for goods.

203. Any officer of customs, excise, coastguard, constabulary, police, or other person duly employed for the prevention of smuggling, may, upon reasonable suspicion or probable cause, stop and examine any cart, waggon or other conveyance, to ascertain whether any smuggled goods are contained therein; and if none shall be found, the officer or other person shall not, on account of such stoppage and examination, be liable to any prosecution or action at law on account thereof, and any person driving or conducting such cart, waggon, or other conveyance, refusing to stop or allow such examination when required in the Queen's name, shall forfeit not less than twenty nor more than one hundred pounds.

Officers authorized by writ of

204. All writs of assistance issued from the Court of Exchequer or other proper court shall continue in force during the reign for which

they were granted, and for six months afterwards; and any officer of Customs or person acting under the direction of the Commissioners of Customs, having such writ of assistance or any warrant issued by a justice of the peace may, in the day time, enter into and search any house, shop, cellar, warehouse, room, or other place, and in case of resistance, break open doors, chests, trunks, and other packages, and seize and bring away any uncustomed or prohibited goods, and put and secure the same in the Queen's warehouse, and may take with him any constable or police officer, who may act as well without as within the limits of the district or place for which he shall have been sworn or appointed.

assistance or warrant may search houses for uncustomed or prohibited goods.

205. If any officer of customs shall have reasonable cause to suspect that any uncustomed or prohibited goods are harboured, kept, or concealed in any house or other place either in the United Kingdom or the Channel Islands, and it shall be made to appear by information on oath before any justice of the peace in the United Kingdom or the Channel Islands, it shall be lawful for such justice, by special warrant under his hand, to authorize such officer to enter and search such house or other place, and to seize and carry away any such uncustomed or prohibited goods as may be found therein; and it shall be lawful for such officer, and he is hereby authorized, in case of resistance, to break open any door, and to force and remove any other impediment or obstruction to such entry, search, or seizure as aforesaid; and such officer may, if he see fit, avail himself of the service of any constable or police officer to aid and assist in the execution of such warrant, and any constable or other police officer is hereby required when so called upon, to aid and assist accordingly.

Officers may search premises by warrant granted on reasonable cause shown.

206. If any such goods liable to duties of customs, or prohibited to be imported, or in any way restricted, shall be stopped or taken by any police officer on suspicion that the same had been feloniously stolen, he may carry the same to the police office to which the offender if detained is taken, there to remain until, and in order to be produced at the trial of such offender, and in such case the officer is required to give notice in writing to the Commissioners of Customs of such stoppage or detention, with the particulars of the goods; but immediately after such stoppage, if the offender be not detained, or if detained immediately after the trial of such offender, such officer shall convey to and deposit the goods in the nearest customs warehouse, to be proceeded against according to law; and if any police officer so detaining any such goods shall neglect to convey the same to such warehouse, or to give the notice hereinbefore prescribed, he shall forfeit a sum not exceeding twenty pounds.

Goods stopped by justice may be retained till trial of persons charged with stealing them.

207. Whenever any seizure shall be made, unless in the possession or in the presence of the offender, master, or owner, as forfeited under the Customs Acts or under any Act by which customs officers are empowered to make seizures, the seizing officer shall give notice in writing of such seizure and of the grounds thereof to the master or owner of the things seized, if known, either by delivering the same to him personally or by letter addressed to him and transmitted by post to or delivered at his last known place of abode or business, if known; and all seizures made under the Customs Acts, or under any Act by which customs officers are empowered to make seizures, shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the Commissioners of Customs may direct, unless the person from whom such seizure shall have been made, or the master or owner thereof, or some person authorized by him, shall, within one calendar month from the day of seizure, give notice in writing, if in London, to the person seizing the same, or to the secretary or solicitor for the Customs, and if elsewhere, to the person seizing the same, or to the collector or other chief

Notice to be given by seizing officer to owner of ship, or goods seized and seizure may be claimed within one month. Perishable goods, &c., may be sold.

officer of Customs at the nearest port, that he claims the things so seized or intends to claim them, whereupon proceedings shall be taken for the forfeiture or condemnation thereof either by information filed in the Exchequer Division of the High Court of Justice in England on the Revenue side, or exhibited before any justice of the peace; but if any things so seized shall be of a perishable nature, or consist of horses or other animals, the same may by direction of the Commissioners of Customs be sold, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof.

Disposal of seizures.

208. All seizures whatsoever which shall have been made and condemned under the Customs Acts or any other Act by which seizures are authorised to be made by officers of customs shall be disposed of in such manner as the Commissioners of Customs may direct.

Seizures may be restored and punishment mitigated.

209. When any seizure shall have been made, or any fine or penalty incurred or inflicted, or any person committed to prison for any offence under the Customs Acts, the Commissioners of the Treasury or Customs may direct the restoration of such seizure, whether condemnation shall have taken place or not, or waive proceedings, or mitigate, or remit such fine or penalty, or release from confinement either before or after conviction such person on any terms and conditions as they shall see fit.

Offences on the water and jurisdiction.

229. Where any offence shall be committed in any place upon the water not being within any county of the United Kingdom, or where the officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall for the purposes of the Customs Act be deemed and taken to be an offence committed on the high seas; and for the purpose of giving jurisdiction under such Acts, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place on land where the offender or person complained against may be or be brought.

Persons previously convicted may, on verdict, be imprisoned in House of Correction.

237. When any verdict shall pass or conviction be had against any person for any offence against the Customs Acts, and he shall have been adjudged to pay a penalty exceeding one hundred pounds, the presiding judge or justice may, if for a first offence, commit the offender to prison for not less than six nor more than nine months, and if for a subsequent offence, may order that the offender shall, in lieu of payment of the penalty, be imprisoned in gaol, or house of correction, with or without hard labour, for a period of not less than six nor more than twelve months, and the governor or keeper of such gaol or house of correction is hereby required to receive any person committed under such order.

#### *As to Prosecutions by Indictment or Information.*

In whose names indictments or suits to be preferred.

255. All indictments or suits for any offences or the recovery of any penalties or forfeitures under the Customs Acts shall, except in the cases where summary jurisdiction is given to justices, be preferred or commenced in the name of Her Majesty's Attorney-General for England or Ireland, or of the Lord Advocate of Scotland, or of some officer of Customs or Inland Revenue.

The Attorney-General or Lord Advocate may enter a *nolle prosequi*.

256. In any prosecution for recovery of any fine, penalty, or forfeiture incurred under the Customs Acts, Her Majesty's Attorney-General for England, Her Majesty's Attorney-General for Ireland, or the Lord Advocate of Scotland, if satisfied that such fine, penalty, or forfeiture was incurred without any intention of fraud, or that it may be inexpedient to proceed in the said prosecution, may enter a *nolle prosequi* or otherwise on such information.

Suits, &c., to be exhibited

257. All suits, indictments, or informations brought or exhibited for any offence against the Customs Acts, shall be brought or exhibited in any court or before any justice,

shall be brought or exhibited within three years next after the date of the offence committed.

258. Any indictment, prosecution, or information which may be instituted or brought under the direction of the Commissioners of Customs for offences against the Customs Acts shall and may be inquired of, examined, tried, and determined in any county of England when the offence is committed in England, and in any county of Scotland when the offence is committed in Scotland, and in any county in Ireland when the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried.

within three years.

Indictments or informations may be tried in any county in England, Scotland, or Ireland, respectively.

*As to Proofs in Proceedings.*

259. If in any prosecution in respect of any goods seized for non-payment of duties, or any other cause of forfeiture, or for the recovering any penalty or penalties under the Customs Acts, any disputes shall arise whether the duties of Customs have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully unshipped, or concerning the place from whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution, and where any such proceedings are had in the Exchequer Division of the High Court of Justice on the Revenue side, the defendant shall be competent and compellable to give evidence.

Defendant's proof in smuggling cases.

260. The averment that the Commissioners of Customs or Inland Revenue have directed or elected that any information or proceeding under the Customs Acts shall be instituted, or that any ship or boat is foreign or belonging wholly or in part to Her Majesty's subjects, or that any person detained or found on board any ship or boat liable to seizure is or is not a subject of Her Majesty, or that any goods thrown overboard, staved or destroyed, were so thrown overboard, staved or destroyed to prevent seizure, or that any goods thrown overboard, staved or destroyed during chase by any ship or boat in Her Majesty's service, or in the service of the Revenue, were so thrown overboard, staved or destroyed to avoid seizure, or that any person is an officer of customs or excise, or that any person was employed for the prevention of smuggling, or that the offence was committed within the limits of any port, or where the offence is committed in any port of the United Kingdom, the naming of such port in any information or proceedings shall be deemed to be sufficient, unless the defendant in any such case shall prove to the contrary,

Averments in smuggling cases.

261. If, upon any trial, a question shall arise whether any person is an officer of the army, navy, marines, or coastguard, duly employed for the prevention of smuggling, or an officer of customs or excise, his own evidence thereof, or other evidence of his having acted as such, shall be deemed sufficient, without production of his commission or deputation; and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information.

Evidence that party is an officer, competency of witness.

262. Upon the trial of any issue, or upon any judicial hearing or investigation touching any seizure, penalty, or forfeiture, or other proceeding under the Customs Acts, or any Act relating to the excise, or incident thereto, where it may be necessary to give proof of any order issued by the Commissioners of the Treasury, or by the Commissioners of Customs, or Inland Revenue respectively, the order, or any letter or instructions referring thereto, which shall have been officially received by any officer

What shall be evidence of order of Treasury, or Commissioners of Customs, or Inland Revenue.

Evidence of  
condemnation  
in forfeiture.

of customs or excise for his government, and under which he shall have acted as such officer, shall be admitted and taken as sufficient evidence and proof of such order.

263. Condemnation by any justice under the Customs laws may be proved in any court of justice, or before any competent tribunal, by the production of a certificate of such condemnation purporting to be signed by such justice, or an examined copy of the record of such condemnation certified by the clerk to such justice.

*Miscellaneous Matters as to the Interpretation of Terms used in this Act.*

Interpretation  
of terms.

284. For the purposes of this or any other Act relating to the Customs and in construing the same, the following terms, when not inconsistent with the context or subject matter, shall have the several meanings, and include the several matters and things hereinafter prescribed and assigned to them ; that is to say :

‘Attorney-General’ shall include solicitor-general, attorney-general in the Isle of Man, procureur, or other chief law officer of the Crown, in any of Her Majesty’s possessions abroad, where there is no attorney-general.

‘British possession’ shall mean and include colony, plantation, island, territory, or settlement belonging to Her Majesty.

‘Channel Islands’ shall mean the islands of Guernsey, Jersey, Alderney, and Sark, and their respective dependencies.

‘Commissioners of the Treasury’ shall mean the Lords Commissioners of Her Majesty’s Treasury.

‘County’ shall mean and include any city, county of a city, county of a town, borough, or other magisterial jurisdiction where such construction is not inconsistent with the context.

‘Customs Acts’ shall mean and include this and all or any other Acts or Act relating to the Customs.

‘Exporter of goods for which no bond is required’ shall include and apply to the person subscribing the declaration required at the foot of the specification forms No. 8 and No. 9, or manifest in lieu thereof, as the case may be.

‘Drawback’ shall include bounty.

‘Gaoler’ shall mean and include any governor or keeper of Her Majesty’s prisons.

‘Her Majesty’ shall mean Her Majesty, her heirs and successors.

‘Importer’ shall mean, include, and apply to any owner or other person for the time being possessed of or beneficially interested in any goods at and from the time of the importation thereof, until the same are duly delivered out of the charge of the officers of Customs.

‘Justice’ shall mean and include justice of the peace, county court judge, recorder, sheriff depute, governor, deputy governor, lieutenant-governor, bailiff, chief magistrate, deemster, jurat, and any other magistrate in the United Kingdom and the Channel Islands.

‘Master’ shall mean the person having or taking the charge or command of any ship.

‘Official import lists and official export lists’ shall mean any lists which are now or shall from time to time be issued under the authority of the Commissioners of the Treasury or Customs, prescribing the denominations, descriptions, and quantity by tale, weight, measure, value, or otherwise, by which articles of merchandise shall be required to be entered on their importation into or exportation from the United Kingdom.

‘Proper officer of Inland Revenue,’ in the fourth section of the Act of the thirty-seventh and thirty-eighth years of Her Majesty’s reign, shall mean ‘proper officer of customs.’

‘Queen’s warehouse’ shall mean any place provided by the Crown or

approved by the Commissioners of Customs for the deposit of goods for security thereof and of the duties due thereon.

'Warehouse' shall mean any place in which goods entered to be warehoused may be lodged, kept, and secured.

288. The several Acts and parts of Acts set forth in Schedule (A.) to this Act annexed are hereby repealed, to the extent to which such Acts or parts of Acts are by such Schedule expressed to be repealed, except as to any thing done before the commencement of this Act, and except so far as relates to any arrears of duty or to any drawback which shall have become due or payable, and except so far as may be necessary for the purpose of supporting or continuing any proceeding heretofore taken or to be taken after the commencement of this Act, and except as to the recovery or application of any penalty for any offence which shall have been committed, or any forfeiture which shall have been incurred before the commencement of this Act; and all orders made by Her Majesty in Council, all bonds taken or licences granted, and all things done under the authority or in pursuance of any of the Acts hereby repealed, shall nevertheless be valid and effectual; and all commissions, deputations, and appointments granted to any officer of customs in force at the commencement of this Act shall continue in force as if the same had been granted under the authority of this Act; and all bonds or other securities which shall have been given by or for such officers and their respective sureties for good conduct or otherwise shall remain in force; and all warrants, licences, orders, and regulations made by the Commissioners of the Treasury or the Customs under any Act or Acts relating to the Customs now repealed, shall remain in force until altered, revoked, or rescinded, or others made by them in lieu thereof; and all Acts done in pursuance of any such orders and regulations shall be and are hereby declared to be valid; and all ports, inland bonding places, havens, creeks, and boarding stations, legal quays, sufferance wharves and warehouses appointed or approved under any of the Acts hereby repealed, shall continue until the appointment or approval thereof shall be annulled, varied, or altered by the said Commissioners.

290. This Act shall come into operation on the day of the passing of this Act, and in citing it in other Acts of Parliament and in legal instruments it shall be sufficient to use the expression "The Customs Consolidation Act, 1876."

Acts set forth in schedule (A) repealed.  
Orders, &c., under Acts repealed to be valid. Commissions, deputations, bonds, &c., to remain in force.  
Warrants, orders, and regulations to remain in force. Ports, bonding places, havens, creeks, &c., to continue.

Commencement of Act, &c.

#### SCHEDULE (A) OF ACTS TO BE REPEALED.

Schedule.

Date of Act.	Title of Act.	Extent of Repeal.
8 & 9 Vict. c. 85.	An Act for the Management of the Customs.	Sections 2 & 3.
16 & 17 Vict. c. 107.	An Act to amend and consolidate the laws relating to the Customs of the United Kingdom and of the Isle of Man, and certain laws relating to Trade and Navigation and the British possessions.	The whole Act, except sections 114, 115, and 116, relating to cards; sections 165, 166, 181, 182, 183, 185, 187, and 188, so far as they relate to those of Her Majesty's possessions abroad in which other provisions have not been substituted by Local Act or Ordinance with the sanction of Her Majesty; sections 324 to 327, both inclusive, and

Date of Act.	Title of Act.	Extent of Repeal.
		329 to 331, both inclusive, relating to reciprocity in commerce; and sections 332, 333, and 335 to 341, both inclusive, and also 343, 344, and 345, relating to the acquisition and disposal of lands.
18 & 19 Vict. c. 96.	The Supplemental Customs Consolidation Act.	The whole Act.
18 & 19 Vict. c. 97.	The Customs Tariff Act, 1855.	The whole Act.
19 & 20 Vict. c. 75.	The Customs Laws and Duties Amendment Act, 1856.	The whole Act except section 6.
20 Vict. c. 15.	The Customs Duties Amendment Act, 1857.	The whole Act.
20 & 21 Vict. c. 61.	The Customs and Excise Duties Act, 1857.	The whole Act.
20 & 21 Vict. c. 62.	The Customs Amendment Act, 1857.	The whole Act.
21 Vict. c. 12.	The Customs Duties Act, 1858.	The whole Act.
22 & 23 Vict. c. 37.	The Customs Amendment Act, 1859.	The whole Act.
23 Vict. c. 22.	The Customs Tariff Amendment Act, 1860.	The whole Act.
23 & 24 Vict. c. 36.	The Customs Inland Bonding Act, 1860.	The whole Act.
24 Vict. c. 20.	The Customs and Inland Revenue Act, 1861.	So much as relates to Customs.
25 Vict. c. 22.	The Customs and Inland Revenue Act, 1862.	So much as relates to Customs.
26 Vict. c. 22.	The Customs and Inland Revenue Act, 1863.	So much as relates to Customs.
27 Vict. c. 18.	The Customs and Inland Revenue Act, 1864.	So much as relates to Customs.
28 Vict. c. 30.	The Customs and Inland Revenue Act, 1865.	So much as relates to Customs.
28 & 29 Vict. c. 95.	The Sugar Duties and Drawbacks Act, 1865.	The whole Act.
30 Vict. c. 10.	The Sugar Duties Act, 1867.	The whole Act.
30 Vict. c. 23.	The Customs and Inland Revenue Act, 1867.	So much as relates to Customs.
30 & 31 Vict. c. 82.	The Customs Amendment Act, 1867.	The whole Act.
31 Vict. c. 28.	The Customs and Income Tax Act, 1868.	So much as relates to Customs.



Date of Act.	Title of Act.	Extent of Repeal.
32 & 33 Vict. c. 14.	The Customs and Inland Revenue Duties Act, 1869.	So much as relates to Customs.
33 Vict. c. 12.	The Customs (Isle of Man) Act, 1870.	The whole Act.
33 & 34 Vict. c. 32.	The Customs and Inland Revenue Act, 1870.	So much as relates to Customs.
34 Vict. c. 21.	The Customs and Income Tax Act, 1871.	So much as relates to Customs.
36 Vict. c. 29.	The Customs Sugar Duties (Isle of Man) Act, 1873.	The whole Act.
37 & 38 Vict. c. 16.	The Customs and Inland Revenue Act, 1874.	So much as relates to Customs.

## 39 &amp; 40 VICT. C. 45.

*An Act to Consolidate and Amend the Laws relating to Industrial and Provident Societies.*

[11th August, 1876.]

Whereas it is expedient to consolidate and amend the law relating to Industrial and Provident Societies, and to assimilate the same in certain respects to the law relating to Friendly Societies.

Industrial and  
Provident  
Societies Act,  
1876.

Be it enacted by, &c., as follows :—

1. This Act may be cited as “The Industrial and Provident Societies Act, 1876.”

2. This Act shall extend to Great Britain and Ireland and the Channel Islands.

11. Registered societies shall be entitled to the following privileges :—

(1.) The registration of a society shall render it a body corporate by the name described in the acknowledgment of registry by which it may sue and be sued, with perpetual succession and a common seal, and with limited liability; and shall vest in the society all property for the time being vested in any person in trust for the society; and all legal proceedings pending by or against the trustees of any such society may be prosecuted by or against the society in its registered name without abatement.

24. Every instrument or document, copy, or extract of an instrument or document, bearing the seal or stamp of the central office, shall be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature.

## 39 &amp; 40 VICT. C. 48.

*An Act to Amend the Law with reference to Bankers Books Evidence.*

[11th August, 1876.]

Whereas serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings.

And whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books :

Be it therefore enacted, &c., as follows :—

Short title.

1. This Act may be cited for all purposes as “ The Bankers Books Evidence Act, 1876.”

Interpretation clause.

2. The word ‘ bank ’ in this Act shall mean any person or persons, partnership or company, carrying on the business of bankers, and who at the commencement of each year shall have made their return to the Commissioners of Inland Revenue, and any savings’ bank certified under the Act of 1863.

The words ‘ legal proceedings ’ in this Act shall include all proceedings, whether preliminary or final, in courts of justice, both criminal and civil, legal and equitable, and shall include all proceedings, whether preliminary or final, by way of arbitration, examination of witnesses, assessment of damages, compensation, or otherwise, in which there is power to administer an oath.

The words ‘ the court ’ in this Act shall mean the court, judge, magistrate, sheriff, arbitrator, or other person authorized to preside over the said legal proceedings for the time being, and shall include all persons, judges, or officers having jurisdiction and authorized to preside over or to exercise judicial control over the said legal proceedings or the procedure or any steps therein.

The words ‘ a judge of one of the superior courts ’ shall mean respectively a judge of Her Majesty’s High Court of Justice in so far as this Act applies to England and Wales, a lord ordinary of the outer house of the Court of Session in Scotland in so far as it applies to Scotland, and a judge of one of the superior courts at Dublin in so far as it applies to Ireland.

Sects. 3, 4, and 5. See vol. 3, pp. 438, 439.

Power under order of court to inspect books and take copies.

6. On the application of any party to any legal proceedings who has received such notice, a judge of one of the superior courts may order that such party be at liberty to inspect and to take copies of any entry or entries in the ledger, day books, cash books, or other account books of any such bank relating to the matters in question in such legal proceedings, and such orders may be made by such judge at his discretion either with or without summoning before him such bank or the other party or parties to such legal proceedings, and shall be intimated to such bank at least three days before such copies are required.

Sect. 7. See vol. 3, p. 439.

Bank not compellable to produce books except in certain cases.

8. No bank shall be compellable to produce the ledgers, day books, cash books, or other account books of such bank in any legal proceedings, unless a judge of one of the superior courts specially orders that such ledgers, day books, cash books, or other account books should be produced at such legal proceedings.

Sect. 9. See vol. 3, p. 439.

39 & 40 VICT. C. 57.

*An Act to Amend the Law respecting the Holding of Winter Assizes.*

[11th August, 1876.]

Whereas it is usual to hold winter assizes in some counties, and not to hold them in other counties in which there are but few prisoners awaiting trial, and it is expedient to provide for the more speedy trial of such last-mentioned prisoners :

Be it therefore enacted, &c. :—

Short title.

1. This Act may be cited as “ The Winter Assizes Act, 1876.”

2. Where it appears to Her Majesty that by reason of the small number of prisoners or otherwise it is usually inexpedient to hold separate winter assizes for any county, it shall be lawful for Her Majesty by Order in Council from time to time to provide in such manner and subject to such regulations as to Her Majesty may seem meet for all or any of the following matters :

Power by Order in Council to unite counties for purpose of winter assizes.

- (1.) For uniting such county for the purpose of winter assizes to any neighbouring county or counties ; and
- (2) For the appointment of the place or places at which winter assizes are to be held for such united counties, with power to direct that they shall be held at different places in different years ; and
- (3) For the jurisdiction of the court and the attendance, jurisdiction, authority, and duty of sheriffs, gaolers, officers, jurors, and persons, the use of any prison, the removal of prisoners, the alteration of any commissions, writs, precepts, indictments, recognizances, proceedings, and documents, the transmission of recognizances, inquisitions, and documents, and the expenses of prosecutors and witnesses, and of maintaining and removing prisoners, so far as may seem to Her Majesty necessary for carrying into effect an Order in Council under this Act ; and
- (4) For any matters which appear to Her Majesty to be necessary or proper for carrying into effect an Order in Council under this Act.

An Order in Council purporting to be made in pursuance of this Act shall be deemed to be within the powers of this Act, and shall while it is in force have effect as if it were enacted in this Act, and for all the purposes of the holding of the winter assizes the counties united by the Order shall, subject to the provisions of the Order, be deemed to be one county, and the winter assizes held in and for such united county shall be deemed also to be held in and for each of the constituent counties.

3. Her Majesty may from time to time by Order in Council revoke, alter, or add to any Order made in pursuance of this Act.

Provision as to Order in Council.

Every Order in Council made in pursuance of this Act shall be published in the London Gazette and laid before both Houses of Parliament within one month after it is made, if Parliament is then sitting, and if not, within one month after the then next meeting of Parliament.

4. All enactments relating to the power of Her Majesty to alter the circuits of the judges, or places at which assizes are holden, or otherwise relating to assizes and circuits, shall apply and may be put in force for the purpose of carrying into effect this Act or any Order made thereunder.

Application of existing Acts as to alteration of circuits.

5. It shall be lawful for Her Majesty from time to time by Order in Council to direct that, subject to any exceptions contained in the Order, the jurisdiction of the justices and judges of the Central Criminal Court at any session of oyer and terminer and gaol delivery held for the Central Criminal Court district in the months of November, December, or January shall extend to any neighbouring county or part of a county mentioned in the Order as if such county or part of a county were included within the limits of the Central Criminal Court district, and to apply, with such modifications and exceptions (if any) as to Her Majesty may seem fit, the Central Criminal Court Act to the said county or part of a county and offences committed therein as if the same were a county or part of a county mentioned in that Act.

Provision for neighbouring counties to Central Criminal Court district.

An Order in Council purporting to be made in pursuance of this section shall be deemed to be within the powers of this Act, and shall, while it is in force, have effect as if it were enacted in this Act.

## Definitions.

## 6. In this Act—

The expression ‘winter assizes’ means any court of assize or any sessions of oyer and terminer or gaol delivery held in the month of November, the month of December, or the month of January.

The expression ‘Central Criminal Court district’ means the district within the limits of the Act 4 & 5 Will. 4, c. 36, intituled “An Act for establishing a new court for the trial of offences committed in the metropolis and parts adjoining;” and the expression ‘Central Criminal Court Act’ means the last-mentioned Act.

The expression ‘county’ in this Act shall include any county of a city or county of a town, and any such division of any county as is constituted by Order in Council under the Act 3 & 4 Will. 4, c. 71, intituled “An Act for the appointment of convenient places for the holding of Assizes in England and Wales.”

39 & 40 VICT. c. 80.

*An Act to amend the Merchant Shipping Acts.*

[15th August, 1876.]

Be it enacted by, &c., as follows :—

*Preliminary.*

## Short title.

1. This Act may be cited as “The Merchant Shipping Act, 1876.”

## Construction of Act.

2. This Act shall be construed as one with “The Merchant Shipping Act, 1854,” and the Acts amending the same; and the said Acts and this Act may be cited collectively as “The Merchant Shipping Acts, 1854 to 1876.”

## Commencement of Act.

3. This Act shall come into operation on the first day of October, 1876 (which day is in this Act referred to as the commencement of this Act); nevertheless, any Orders in Council and general rules under this Act may be made at any time after the passing of this Act, but shall not come into operation before the commencement of this Act.

*Unseaworthy Ships.*

## Sending unseaworthy ship to sea a misdemeanor.

4. Every person who sends or attempts to send, or is party to sending or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanor, unless he proves that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness.

Every master of a British ship who knowingly takes the same to sea in such unseaworthy state that the life of any person is likely to be thereby endangered shall be guilty of a misdemeanor, unless he proves that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness.

A prosecution under this section shall not be instituted except by or with the consent of the Board of Trade, or of the governor of the British possession in which such prosecution takes place.

A misdemeanor under this section shall not be punishable upon summary conviction.

## Obligation of shipowner to

5. In every contract of service, express or implied, between the owner

of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same: Provided, that nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable.

crew with  
respect to se-  
curing seawor-  
thiness.

40. For the purpose of punishment, jurisdiction, and legal proceedings, an offence under this Act shall be deemed to be an offence under "The Merchant Shipping Act, 1854." Legal proceed-  
ings.

Sec. 45 repeals as from the commencement of the Act (amongst other enactments) 17 & 18 Vict., c. 104, s. 449; 34 & 35 Vict., c. 110 (The Merchant Shipping Act, 1871), s. 11; 36 & 37 Vict., c. 85 (The Merchant Shipping Act, 1873), ss. 11, 12, 13 and 14, and 38 & 39 Vict., c. 88 (The Merchant Shipping Act, 1875). Repeal of Acts.



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